

# Section 1983 Litigation

*Third Edition*

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## *Preface and Acknowledgments*

This monograph analyzes the legal principles and issues that arise in litigation under 42 U.S.C. § 1983, the statute for redressing constitutional and federal statutory violations by state and local officials, by municipalities, and by private-party state actors, and the case law applying those principles. Research for this edition concluded with the October 2013 Supreme Court term ending June 30, 2014, and covers courts of appeals decisions reported through June 1, 2014. Valuable authorities are cited in the endnotes to the text.

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# 1. Introduction to § 1983 Litigation

## I. The Statute

Section 1983 of Title 42 of the U.S. Code is a vital part of American law. The statute authorizes private parties to enforce their federal constitutional rights, and some federal statutory rights, against municipalities, state and local officials, and other defendants who acted under color of state law. Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>1</sup>

## II. Historical Background

When interpreting § 1983, the Supreme Court has considered congressional intent, common-law principles, policy concerns, and principles of federalism. The Supreme Court has relied on the historical background behind the statute in several major decisions interpreting § 1983.<sup>2</sup> Congress passed 42 U.S.C. § 1983 in 1871 as § 1 of the “Ku Klux Klan Act.” The statute, however, did not emerge as a tool for checking abuses by state officials until 1961, when the Supreme Court decided *Monroe v. Pape*.<sup>3</sup> In *Monroe*, the Court articulated three purposes for passage of the statute: (1) to “override certain kinds of state laws”; (2) to provide “a remedy where state law was inadequate”; and (3) “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.”<sup>4</sup>

*Monroe* resolved two important issues that allowed 42 U.S.C. § 1983 to become a powerful statute for enforcing rights secured by the Fourteenth

Amendment. First, the Court held that actions taken by state governmental officials in carrying out their official responsibilities, even if contrary to state law, were nevertheless actions taken “under color of law.”<sup>5</sup> In the course of reaching this conclusion, the Court established the important principle that § 1983 “should be read against the background of tort liability that makes a [person] responsible for the natural consequences of his actions.”<sup>6</sup> Second, the Court held that individuals who assert a violation of federally protected rights have a federal remedy under § 1983 even if the officials’ actions also violated state law for which the state affords a remedy.<sup>7</sup> In short, the Court in *Monroe* held that Congress enacted § 1983 to provide an independent federal remedy supplemental to available state law remedies. The federal judicial forum was necessary to vindicate federal rights because, according to Congress in 1871, state courts could not be counted on to protect Fourteenth Amendment rights because of their “prejudice, passion, neglect, [or] intolerance.”<sup>8</sup> The Supreme Court has identified the policies underlying § 1983 as including compensating persons whose federally protected rights are violated by action under color of state law, and preventing future violations.<sup>9</sup>

With *Monroe* opening the door to the federal courthouse, constitutional litigation against state and local officials developed. Later, plaintiffs seeking monetary damages sued not only state and local officials, but began to sue cities and counties as well.<sup>10</sup> They also sought prospective injunctive relief against state officials. Ultimately, the federal courts became the principal forum for bringing state and local governmental policies and practices into compliance with federal law.

In *Monell v. Department of Social Services*,<sup>11</sup> the Supreme Court overruled the part of *Monroe* that had found that Congress did not intend to subject municipal entities to liability under § 1983. Employing a “fresh analysis” of the legislative history of the Civil Rights Act of 1871, the Court found that Congress intended to subject municipal entities to liability under § 1983, though not on the basis of respondeat superior. *Monell* held that Congress intended that municipal entities would be liable under § 1983 only when an official’s unconstitutional action carried out a municipal policy or practice.<sup>12</sup>

In *Hudson v. Michigan*,<sup>13</sup> the Supreme Court acknowledged that § 1983 had undergone a “steady expansion” since the Court’s 1961 decision in *Monroe*, including the recognition of municipal liability claims in *Monell*

and the availability of attorneys' fees under 42 U.S.C. § 1988(b), the Civil Rights Attorney's Fees Awards Act of 1976.<sup>14</sup> *Hudson* rejected the exclusionary rule for violations of the Fourth Amendment knock-and-announce rule, in part because a § 1983 damages claim provided an adequate alternative remedy.<sup>15</sup> The Court emphasized the importance of the § 1988 attorney's fee remedy, namely, that "[c]itizens and lawyers are much more willing to seek relief in the courts for police misconduct"<sup>16</sup> and other constitutional violations. The Court in *Hudson* affirmed the importance of both the federal § 1983 remedy for unconstitutional state action, and § 1988's authorization of attorneys' fees in § 1983 actions.

### III. Nature of § 1983 Litigation

A wide array of claimants file § 1983 lawsuits in federal and state courts. These claimants include alleged victims of police misconduct; prisoners; present and former public employees and licensees; property owners; and applicants for and recipients of public benefits. Claimants may name as defendants state and municipal officials, municipal entities, and private parties who acted under color of state law.

Section 1983 litigation often requires courts to examine complex, multifaceted issues. Courts may have to interpret the federal Constitution, federal statutes (including § 1983 itself), and even state law. In addition, even if a plaintiff establishes a violation of a federally protected right, she may not necessarily obtain relief. Courts may deny relief after resolving numerous other issues: jurisdictional questions, such as the *Rooker-Feldman* doctrine,<sup>17</sup> the Eleventh Amendment, standing, and mootness; affirmative defenses, such as absolute and qualified immunity; procedural issues, such as the statute of limitations and preclusion; and the various abstention doctrines.

The three most recurring issues in § 1983 cases are (1) whether a plaintiff has established a violation of a federal constitutional right; (2) whether qualified immunity protects an official from personal monetary liability; and (3) whether a plaintiff has established a basis for imposing municipal liability through enforcement of a municipal policy, a municipal practice, or a decision of a municipal policy maker.

The last stage of a § 1983 action is normally an application by the prevailing party for attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b). Section 1988 fee applications

often generate a wide range of issues, including whether the plaintiff was a “prevailing party”; whether “special circumstances” justify the courts’ denying fees to a prevailing plaintiff; whether a prevailing defendant should be awarded fees; what constitutes a reasonable hourly rate; what constitutes a reasonable number of billable hours; and whether the circumstances justify an upward or downward departure from the “lodestar” (the number of reasonable hours times the reasonable hourly market rates for lawyers in the community with comparable background and experience).<sup>18</sup>

Each year the federal courts face dockets filled with huge numbers of § 1983 cases. The lower court decisional law is voluminous. Federal district courts should be aware that there might be conflicts in approaches among the circuits.

#### **IV. Discovery**

There are frequently sharp factual disputes in § 1983 actions alleging constitutional violations. For example, in § 1983 excessive force claims, the plaintiffs and the defendant-officers typically assert very different versions of the encounter. In § 1983 First Amendment retaliation cases, the defendant will almost certainly deny having acted with a retaliatory motive. Factual disputes are much less frequent in cases alleging violations of federal statutory rights.

As in other federal court civil cases presenting disputed issues of material facts, pretrial discovery can play an important role in a § 1983 action.<sup>19</sup> There are two major issues that present unique discovery considerations in § 1983 actions. First, because qualified immunity is not only an immunity from liability, but also an immunity “from suit,” that is, from the burdens of litigation, the Supreme Court has directed the district courts to decide qualified immunity, whenever possible, as a matter of law, usually on a motion for summary judgment, pretrial and even pre-discovery.<sup>20</sup> The reality, however, is that it is often not possible to determine whether the defendant violated clearly established federal law until disputed issues of fact have been resolved. The Third Circuit has quoted the author’s position that “[t]he overwhelming problem [with qualified immunity] is the Supreme Court’s insistence that the [qualified] immunity defense be decided as a matter of law, when the reality is that factual issues must frequently be resolved in order to determine whether the defendant violated clearly established federal law.”<sup>21</sup> Supreme Court and lower federal court decisions



do allow carefully tailored discovery addressed to factual issues pertinent to the qualified immunity defense.<sup>22</sup>

The second discovery issue deserving special attention is evidentiary privileges.<sup>23</sup> Two privilege issues of particular importance are the applications of the attorney–client privilege to governmental entities and governmental officials and the various governmental privileges. The extensive decisional law concerning governmental privileges generally requires weighing the need for confidentiality and secrecy against the need of the information and evidence for litigation.<sup>24</sup>

## **V. Right to Trial by Jury**

The Seventh Amendment guarantees the right to a jury trial in suits “at common law, where the value in controversy shall exceed twenty dollars.” Despite the reference to suits “at common law,” it is settled that the “right to a jury trial includes more than common law forms of action recognized in 1791” when the Seventh Amendment was adopted, and “extends to causes of action created by Congress.”<sup>25</sup> The reference to “common law” suits refers to suits for legal, i.e., monetary, as opposed to equitable relief.<sup>26</sup>

It is well established that there is a right to a jury trial in federal court § 1983 actions when a claim is asserted in excess of \$20 for compensatory or punitive damages.<sup>27</sup> Because the Seventh Amendment applies to claims in excess of \$20, if the complaint allegations entitle the plaintiff “to no more than nominal damages, the Seventh Amendment will not be applicable. . . .”<sup>28</sup> There is no right to a jury trial in a § 1983 action in which only equitable relief is sought.<sup>29</sup> When a federal court plaintiff seeks both legal and equitable relief, there is a right to a jury trial on the claim for legal relief, which normally should be tried first.<sup>30</sup>

## **VI. Jury Instructions**

Because § 1983 litigation is frequently multifaceted and complex, the jury instructions may encompass a wide range of issues and run for many pages. In addition to the general instructions used for civil actions, such as the preponderance-of-the-evidence standard, instructions are needed to explain the function of § 1983, the elements of the § 1983 claim for relief, the elements of the particular constitutional claims, causation, and state action. Instructions may also be necessary for such issues as municipal liability, the liability of supervisors, and nominal, compensatory and

punitive damages. The district court's challenge is to provide the jury with instructions that are complete and accurate yet in language lay jurors can understand.<sup>31</sup> The Fourth Circuit, in a § 1983 excessive force case, opined that "what good instructions often do [is] let counsel argue factually in terms of a legal standard, rather than having the judge make counsel's particularized arguments for them."<sup>32</sup> The court said that it has left the choice between generality and specificity in the charge to the sound discretion of the trial court.<sup>33</sup>

The Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have promulgated model jury instructions for civil actions, including for § 1983 actions. The fact that the district court employed a model instruction from its own circuit does not preclude a determination on appeal that the instruction was erroneous.<sup>34</sup> The Seventh Circuit stated that district judges have an obligation to give instructions that are accurate on the law, and may give instructions differing from pattern instructions.<sup>35</sup> It cautioned, however, that "when a judge varies from the pattern instructions, he should do so to make things clearer for the jury, not more confusing."<sup>36</sup>

A sampling of model circuit court jury instructions for § 1983 actions is contained in the Appendix.

## 2. Constitutional Claims Against Federal Officials: The *Bivens* Doctrine

### I. Section 1983 Does Not Encompass Claims Against Federal Officials

An essential element of a § 1983 claim for relief is that the defendant acted under color of state law.<sup>37</sup> State and local officials who carry out their official responsibilities act under color of state law, as do private parties who engage in state action.<sup>38</sup> Federal officials, however, act under color of federal law, not state law, and thus are not suable under § 1983.<sup>39</sup>

### II. The *Bivens* Claim for Relief

Congress has not enacted a counterpart to § 1983 authorizing a claim for relief based on constitutional violations by federal officials. To fill this remedial gap, the Supreme Court, in the 1971 landmark decision, *Bivens v. Six Unknown Named Agents*,<sup>40</sup> recognized an implied claim for damages for Fourth Amendment violations by federal law enforcement officers. The *Bivens* claim is a personal-capacity claim against the officer(s) responsible for the constitutional violation.<sup>41</sup> Relying on *Bivens*, the Court held, in *Davis v. Passman*,<sup>42</sup> that a claim for damages could be asserted against a federal official based upon an alleged violation of the equal protection principles of the Fifth Amendment.<sup>43</sup>

The Court stressed, in *Bivens* and *Davis*, that the federal judiciary has the primary responsibility for enforcing federal constitutional rights, and that historically damages have been considered the “ordinary remedy for an invasion of personal interests in liberty.”<sup>44</sup> It expressed concern that failure to recognize the *Bivens* damages remedy against a federal official would leave the plaintiff without a remedy, because constitutional claimants like Webster Bivens and Shirley Davis did not have claims for prospective relief, and could not seek damages against the United States or a federal governmental agency because of sovereign immunity.<sup>45</sup> The Court acknowledged, however, that the *Bivens* remedy might be denied either when Congress created an “equally effective” alternative remedy, or when “special factors counsel[ ] hesitation in the absence of affirmative action by Congress.”<sup>46</sup>

In 1980, in *Carlson v. Green*,<sup>47</sup> the Supreme Court recognized a damages remedy under the *Bivens* doctrine in a suit by the administratrix of the

estate of a deceased federal prisoner. The complaint alleged that the failure of federal prison officials to provide the prisoner adequate medical care violated the Eighth Amendment's prohibition against cruel and unusual punishment. The Court recognized the *Bivens* claim even though the prisoner had an alternative remedy under the Federal Tort Claims Act. The Court in *Carlson* found that (1) Congress did not intend for the FTCA to be the exclusive remedy; and (2) the *Bivens* remedy was more effective than the FTCA remedy.<sup>48</sup>

*Carlson* is the last Supreme Court decision holding that the plaintiff had a right to assert a claim under the *Bivens* doctrine. In a series of decisions dating back to 1983, the Court, in each case, rejected the availability of the *Bivens* claim for relief. Following is a brief summary of these post-*Carlson* decisions.

In 1983, in *Bush v. Lucas*,<sup>49</sup> the Court held that a federal government employee could not assert a First Amendment retaliation *Bivens* claim because Congress created an elaborate alternative administrative remedy, even though this alternative remedy could not afford complete relief. The existence of this administrative remedy was "a special factor counselling against the judicial recognition of a damages remedy under the Constitution in this context."<sup>50</sup> That same year, in *Chappell v. Wallace*,<sup>51</sup> the Court held that navy personnel could not assert *Bivens* claims based upon allegations that their superior officers' performance evaluations and imposition of penalties were racially motivated. The Court found that the unique relationship between inferior and superior military officers, and the comprehensive internal system of military justice, were special factors justifying denial of the *Bivens* remedy.

In 1987, in *United States v. Stanley*,<sup>52</sup> the Court denied a *Bivens* remedy to a former serviceman who alleged that, as part of a military experiment he had been administered LSD without his consent, causing him serious mental disabilities and injuries. The Court extended *Chappell* by denying the *Bivens* remedy to any claim arising out of or incident to military service, not just claims by inferior officers against their superiors.

In 1988, the Court held, in *Schweiker v. Chilicky*,<sup>53</sup> that plaintiffs who claimed that their Social Security benefits were terminated in violation of their due process rights could not assert *Bivens* claims because Congress created alternative comprehensive administrative and judicial review remedies. As in *Lucas*, the existence of these alternative remedies was a "special

factor” justifying denial of the *Bivens* remedy. The Court spelled out that, since *Carlson*, it has “responded cautiously to suggestions that *Bivens* remedies be extended into new contexts,” and concluded that Congress was better suited than the judiciary to formulate remedies for constitutional violations.<sup>54</sup> This of course was a major shift in judicial philosophy from that articulated in *Bivens* that the judiciary has primary responsibility for formulating remedies for constitutional violations. This shift in judicial philosophy underscores the separation of powers issue underlying the *Bivens* doctrine.

In 1994, in *FDIC v. Meyer*,<sup>55</sup> the Court held that a *Bivens* claim may be asserted only against a federal official, not against a federal agency, because the purpose of the *Bivens* remedy is to deter federal officers—not federal agencies—from acting unconstitutionally. In 2001, in *Correctional Services Corp. v. Malesko*,<sup>56</sup> the Court reasoned that “[i]f given the choice, plaintiffs would sue a federal agency instead of an individual [official] who could assert qualified immunity,” and that this stratagem would thwart the deterrent effect of the *Bivens* remedy.<sup>57</sup>

Relying heavily on *Meyer*, the Court in *Malesko* held that a federal prisoner could not assert a *Bivens* claim against a private operator of a halfway house. The Court again stressed its consistent refusal to extend *Bivens* liability to new contexts or new defendants. In 2007, in *Wilkie v. Robbins*,<sup>58</sup> the Court rejected a *Bivens* claim by landowners who alleged that government officials unconstitutionally interfered with their property rights. The Court again said that Congress was in a far better position than the Court to determine the issue of appropriate remedies.<sup>59</sup>

In 2012, in *Minneeci v. Pollard*,<sup>60</sup> the Court held that a federal prisoner could not assert an Eighth Amendment claim of denial of adequate medical care against employees of a private company that operated a federal prison. The Court found that the existence of adequate state tort remedies justified rejection of the Eighth Amendment *Bivens* remedy.<sup>61</sup> *Minneeci* marked the first time that the Court relied upon the availability of state remedies to justify denial of the *Bivens* remedy.<sup>62</sup>

In *Minneeci* the Court articulated its present two-step approach for determining whether to recognize a *Bivens* remedy:

1. The Court first asks “whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a

convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.”<sup>63</sup>

2. Even in the absence of an alternative remedy, the Court should determine whether “special factors counselling hesitation” justify rejection of the *Bivens* remedy.<sup>64</sup>

The Supreme Court has thus come full circle since the *Bivens-Davis-Carlson* trilogy. While the trilogy treated the damages remedy for constitutional violations by federal officials as an “ordinary,” presumptively available remedy, the post-*Carlson* cases treat the damages remedy as a presumptively unavailable remedy.<sup>65</sup>

### III. Law Governing *Bivens* Claims

When a federal court plaintiff is entitled to assert a *Bivens* claim for money damages for an alleged constitutional violation by a federal official, normally the same procedures and legal principles applied in § 1983 actions will also apply in the *Bivens* suit. In *Ashcroft v. Iqbal*,<sup>66</sup> the Supreme Court stated that “[i]n the limited settings where *Bivens* does apply, the implied cause of action is the ‘federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983.’”<sup>67</sup> The Court made clear in *Iqbal* that the same pleading standards, the rule against respondeat superior liability, and principles of liability for supervisory officials govern both § 1983 and *Bivens* actions. In fact, many years before the Supreme Court’s decision in *Iqbal*, Judge Henry J. Friendly, writing for the Second Circuit, discerned “the general trend in the appellate courts to incorporate § 1983 law into *Bivens* suits.”<sup>68</sup>

Most significantly, the Supreme Court has consistently held that the same common-law immunities available to state and local officials sued for damages under § 1983 may be asserted by federal officials sued under the *Bivens* doctrine.<sup>69</sup> The Court found it “untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.”<sup>70</sup> In fact, the Court commonly applies the same qualified immunity precedents and principles in both § 1983 and *Bivens* actions, and cites its qualified immunity precedents interchangeably in § 1983 and *Bivens* suits.<sup>71</sup>

Lower federal courts hold that the *Heck* doctrine<sup>72</sup> (which holds that a § 1983 challenge to the validity of a conviction or sentence is not cogniza-

ble until the conviction or sentence has been overturned<sup>73</sup>) applies as well to *Bivens* claims,<sup>74</sup> and that the same state limitations period that governs § 1983 claims<sup>75</sup> also governs *Bivens* claims.<sup>76</sup>

One area of difference is the law governing survivorship of claim. The Supreme Court holds that in § 1983 actions, survivorship is governed by state survivorship law, so long as the state law is not inconsistent with the policies of § 1983.<sup>77</sup> In *Carlson*, however, the Court held that whether a *Bivens* claim survives the death of the plaintiff is governed not by state law, but by a uniform rule that the claim survives the plaintiff's death.<sup>78</sup>

### 3. Section 1983: Elements of Claim, Functional Role, Pleading, and Jurisdiction

#### I. Elements of the §1983 Claim

Section 1983 authorizes the assertion of a claim for relief against a person who, acting under color of state law, violated the claimant's federally protected rights. The Supreme Court has identified two elements of a § 1983 claim. The plaintiff must allege both (1) a deprivation of a federal right, and (2) that the person who deprived the plaintiff of that right acted under color of state law.<sup>79</sup> (*See infra* Appendix, Model Instruction 1: Elements of Claim—Action Under Color of State Law.) In the author's view, there are, in fact, at least four major elements for a § 1983 claim.<sup>80</sup> The plaintiff must establish

1. conduct by a "person";
2. who acted "under color of state law";
3. proximately causing;
4. a deprivation of a federally protected right.

In addition, if the plaintiff is seeking to establish municipal liability, she must show that the deprivation of her federal right was attributable to the enforcement of a municipal custom or policy.<sup>81</sup> The plaintiff bears the burden of establishing each element of the claim for relief by a preponderance of the evidence.<sup>82</sup>

*Defendant's State of Mind.* The text of § 1983 does not require the plaintiff to prove that the defendant-official acted with any particular state of mind.<sup>83</sup> The Supreme Court holds that § 1983 does not "contain a state-of-mind requirement" and is not limited "to intentional deprivations of constitutional rights."<sup>84</sup>

However, the particular constitutional right asserted by the plaintiff may require the plaintiff to establish that the defendant acted with a particular state of mind. For example, a complaint stating a violation of the substantive due process component of the Fourteenth Amendment or a violation of procedural due process will require the plaintiff to establish that a state or local official intentionally or deliberately caused a deprivation of life, liberty, or property; negligent conduct will not suffice to estab-



lish a due process violation.<sup>85</sup> A complaint raising racial or gender-based discrimination will invoke heightened judicial scrutiny only if a plaintiff establishes intentional discrimination.<sup>86</sup> A prisoner's complaint asserting the denial of adequate medical care under the Eighth Amendment requires a prisoner to demonstrate that he was a victim of deliberate indifference to a serious medical need.<sup>87</sup> In other words, medical malpractice does not establish a constitutional violation merely because the plaintiff is a prisoner.<sup>88</sup> Because plaintiffs may seek enforcement of a wide range of federal constitutional rights under § 1983,<sup>89</sup> the federal court should evaluate each claim to determine whether it requires the plaintiff to prove that the defendant acted with a particular state of mind.

## II. Functional Role of § 1983

Section 1983 does not itself create or establish any federally protected right. Instead, it creates a cause of action for plaintiffs to enforce federal rights created elsewhere—federal rights created by the federal Constitution or, in some cases, by other federal statutes.<sup>90</sup> In other words, § 1983 fulfills the procedural or remedial function of authorizing plaintiffs to assert a claim for relief against a defendant who, acting under color of state law, violated the plaintiffs' rights guaranteed by the federal Constitution or, in some cases, by a federal statute other than § 1983. In addition, § 1983 provides the exclusive available federal remedy for violations of federal constitutional rights under color of state law. Thus, plaintiffs may not avoid the limitations of a § 1983 claim for relief by asserting a claim directly under the Constitution.<sup>91</sup>

*Section 1981 claims.* The Supreme Court, in *Jett v. Dallas Independent School District*, held that § 1983 is the exclusive remedy for violations of 42 U.S.C. § 1981 under color of state law.<sup>92</sup> The great weight of appellate authority holds that the Civil Rights Act of 1991, in amending § 1981(c), did not alter *Jett's* holding.<sup>93</sup>

## III. Pleading § 1983 Claims

Building upon *Bell Atlantic Corp. v. Twombly*,<sup>94</sup> the Supreme Court's decision in *Ashcroft v. Iqbal*,<sup>95</sup> resolved that federal court civil complaints filed under § 1983, like all other federal court civil complaints, must contain *factual* allegations, not mere conclusions, constituting a "plausible," and not merely a speculative or possible, claim for relief.

The decision in *Iqbal*, however, did not overrule, at least explicitly, the Court's prior precedents concerning pleading standards for federal court civil rights claims. This section sketches out the applicable pleading provisions in the Federal Rules of Civil Procedure; reviews the relevant pre-*Iqbal-Twombly* Supreme Court precedents; analyzes *Twombly* and *Iqbal*; and analyzes the pleading standards for several specific § 1983 claims, namely municipal liability claims, personal-capacity claims subject to qualified immunity, conspiracy claims, and pro se complaints.

A. Pleading Provisions in Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 8(a) provides that the complaint must set forth “(1) a short and plain statement of the grounds on which the court’s jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.” Federal Rule of Civil Procedure 9 requires that certain issues be pleaded “with particularity,” e.g., fraud and mistake. Rule 9(a) provides that “[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally.” State-of-mind issues arise in some § 1983 cases depending on the particular constitutional claim alleged, such as intentional race discrimination under the Equal Protection Clause of the Fourteenth Amendment and prisoner Eighth Amendment challenges to conditions of confinement.<sup>96</sup>

B. Pre-*Twombly/Iqbal* Supreme Court Precedent: *Leatherman* and *Swierkiewicz*

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>97</sup> the Supreme Court in 1993 rejected a “heightened” pleading requirement for § 1983 municipal liability claims because Rules 8 and 9 do not authorize it.<sup>98</sup> The Court held that the generally applicable “notice pleading” standard set forth in the Federal Rules of Civil Procedure governs § 1983 municipal liability claims. The Fourth Circuit observed that the notice pleading standard “is by no means onerous; instead, it is designed to ensure that the complaint ‘will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”<sup>99</sup>

In *Swierkiewicz v. Sorema, N.A.*,<sup>100</sup> the Supreme Court in 2002 rejected a heightened pleading standard for Title VII (of the Civil Rights Act

of 1964) and Age Discrimination in Employment Act (ADEA) claims. As in *Leatherman*, the Court determined that the notice pleading standard created by Rule 8 applies to Title VII and ADEA claims. The Court's decisions in *Leatherman* and *Swierkiewicz* strongly supported the conclusion that notice pleading applied to all § 1983 claims.<sup>101</sup>

### C. *Iqbal/Twombly* Plausibility Standard

In *Bell Atlantic Corp. v. Twombly*,<sup>102</sup> an antitrust case, the Supreme Court ruled that although Federal Rule of Civil Procedure 8(a)(2) notice pleading does not require “detailed factual allegations,” the complaint must provide some factual allegations of the nature of the claim and the grounds on which the claim rests. The plaintiff must plead “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>103</sup> The “[f]actual allegations must be enough to raise a right to relief above the speculative level” to a “plausibility” level.<sup>104</sup> The Court stressed that the district court's ability to manage discovery does not diminish the plaintiff's burden of pleading facts that constitute a plausible claim. Thus,

[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.<sup>105</sup>

The Court also ruled that federal courts should no longer rely on the frequently quoted statement from *Conley v. Gibson*<sup>106</sup>

that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . .<sup>107</sup>

The Court explained why the *Conley* standard should be retired:

[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.<sup>108</sup>

Although *Twombly* could be read as imposing some form of “heightened” pleading requirement, the Supreme Court disavowed any intent

to do so. The Court acknowledged that “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations” and that it was not requiring “heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”<sup>109</sup> Furthermore, the Court in *Twombly* did not expressly state that it was overruling or modifying its earlier decisions in *Leatherman* and *Swierkiewicz*.

In fact, two weeks after its decision in *Twombly*, the Court, in *Erickson v. Pardus*,<sup>110</sup> applied notice pleading to a pro se prisoner’s § 1983 Eighth Amendment medical treatment claim. Citing, *inter alia*, *Twombly* and *Swierkiewicz*, the Court in *Erickson* held that the § 1983 complaint satisfied Rule 8’s notice pleading standard. The Eighth Circuit had dismissed the complaint on the ground that it was conclusory, but the Supreme Court summarily reversed.

The complaint in *Erickson* alleged that the defendant doctor’s “decision to remove [plaintiff] from his prescribed hepatitis C medication was ‘endangering his life,’” and that “[plaintiff’s] medication was withheld ‘shortly after’ [plaintiff] had commenced a treatment program that would take one year, that he was ‘still in need of treatment for this disease,’ and that the prison officials were in the meantime refusing to provide treatment.”<sup>111</sup> The Supreme Court held that these allegations were sufficient to satisfy Rule 8 of the Federal Rules of Civil Procedure.<sup>112</sup> In reaching this conclusion the Court took into account that the plaintiff filed his complaint pro se and that pro se pleadings “‘however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’”<sup>113</sup>

Because *Twombly* was an antitrust case, there was some uncertainty whether the Court’s decision was intended to be limited to antitrust cases or to be applied to federal court civil complaints generally.<sup>114</sup> The Court resolved that issue in *Ashcroft v. Iqbal*,<sup>115</sup> where the Court held that the *Twombly* pleading standards govern *all* federal court civil complaints, thus including those filed under § 1983 and the *Bivens*<sup>116</sup> doctrine. The Court, dividing 5–4, held that the plaintiff’s *Bivens* claims against former Attorney General Ashcroft and FBI Director Mueller did not contain factual allegations constituting a “plausible” claim that these supervisory officials formulated an unconstitutional discriminatory policy.<sup>117</sup>

The Court in *Iqbal* rejected the plaintiff's argument that *Twombly* should be limited to antitrust complaints. It found that *Twombly* was based upon an interpretation of Federal Rule of Civil Procedure 8, and thus applies in *all* civil cases,<sup>118</sup> including § 1983 and *Bivens* suits. *Iqbal* clearly established that § 1983 complaints must contain factual allegations, not mere legal conclusions, and that the factual allegations must constitute a plausible—and not merely possible or speculative—claim for relief. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>119</sup> In other words, legal conclusions must be supported by factual allegations. “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”<sup>120</sup>

Whether the factual allegations constitute a plausible constitutional claim is “context-specific,”<sup>121</sup> dependent upon the particular “constitutional provision at issue”<sup>122</sup> and the nature of the plaintiff's theory of liability. For example, in *Iqbal* the complaint asserted a claim that the defendants, who were supervisory officials, formulated a policy that discriminated against post-9/11 detainees because of their race, religion, or national origin. To determine whether the complaint stated a plausible claim against these supervisory officials, the Court had to consider the standards for imposing § 1983 and *Bivens* liability against a supervisor for wrongs directly inflicted by subordinate officials.<sup>123</sup> The Court found that the complaint's allegations that the defendants adopted the contested policy were too conclusory to constitute a plausible claim.

In reaching this conclusion, the Court ruled that when constitutional claims are premised on a defendant's allegedly illicit purpose, the district court should consider whether there is a more plausible explanation for the defendant's actions than the one alleged in the complaint. The majority found that the plaintiff did not allege a plausible claim that the defendants adopted the contested policy with the intent to discriminate on the basis of race, religion, or national origin. The Court found that the more plausible explanation was that the policy was adopted to further national security.

Reiterating an important theme articulated in *Twombly*, the Court in *Iqbal* emphasized that when the sufficiency of complaint allegations

are challenged on a motion to dismiss, it is irrelevant that the district court may be able to carefully control discovery.<sup>124</sup> This is especially so when government officials assert qualified immunity, because this immunity is designed in part to shield officials from the demands of discovery, which divert their time and energy from their official responsibilities.<sup>125</sup> The “catch-22” problem for some plaintiffs is that they often need discovery to comply with the “plausibility” standard, but their inability to meet the plausibility standard will prevent them from reaching the discovery stage.

The Court in *Iqbal* also interpreted Federal Rule of Civil Procedure 9(b), which requires particularity of pleading of “fraud or mistake,” but allows “[m]alice, intent, knowledge, and other conditions of a person’s mind [to] be alleged generally.” The Court construed this rule as “merely excus[ing] a party from pleading discriminatory intent under an elevated pleading standard. It does not” obviate the requirement of pleading factual allegations supporting a plausible claim.<sup>126</sup> Thus, conclusory allegations of discriminatory intent, without supporting factual allegations, will not be accepted as true on a motion to dismiss, and did not save *Iqbal*’s complaint against Ashcroft and Mueller from dismissal.<sup>127</sup>

Neither *Twombly* nor *Iqbal* purported to overrule either *Leatherman* or *Swierkiewicz*, but also made no attempt to explain how these earlier decisions fit together with *Iqbal*, assuming that they can. The Third Circuit concluded “that because *Conley* [*v. Gibson*] has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”<sup>128</sup> The Supreme Court, however, more recently cited *Swierkiewicz* in concluding that a § 1983 complaint stated a plausible procedural due process claim.<sup>129</sup> In the author’s view, *Leatherman-Swierkiewicz* and *Twombly-Iqbal* are reconcilable if *Leatherman-Swierkiewicz* are read as only rejecting a heightened standard for civil rights complaints. Neither *Twombly* nor *Iqbal* expressed any intent to impose a heightened standard. In fact, the Court in *Twombly* specifically stated that it was not imposing a heightened pleading standard. *Leatherman* remains significant for having specifically rejected a heightened pleading standard for § 1983 municipal liability claims. The reality, however, is that *Iqbal*, the Court’s most recent major decision concerning complaint pleading standards, is the dominant precedent for evaluating the sufficiency of

§ 1983 complaints, with *Leatherman* and *Swierkiewicz* having been relegated to secondary authority at best.

Putting all of the pieces of the *Iqbal* puzzle together, a federal district court or magistrate judge, when faced with a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, should:

1. Separate the factual allegations in the complaint from the legal conclusions.
2. Determine whether the factual allegations state a plausible (not merely possible or speculative) claim.
3. In making this determination, if the complaint contains factual allegations supporting a claim that the defendant acted with a discriminatory animus, consider whether there is a more plausible explanation for the defendant's conduct than the one offered by the plaintiff.
4. In determining whether the complaint states a plausible claim, the court should not take into account its ability to manage discovery.

Of course, it may not be easy to determine whether a complaint allegation is “conclusory” or “nonconclusory,” constitutes an allegation of fact or conclusion of law, and whether the factual allegations constitute a plausible claim.<sup>130</sup> The Court in *Iqbal* observed that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>131</sup> Different federal judges may apply their “judicial experience and common sense” differently. One need not look further than the five-to-four disagreement of Justices in *Iqbal*. While the majority found that the complaint's allegations were too conclusory to constitute a plausible claim, the dissenting Justices, reading the same complaint, and applying essentially the same pleading standards, found the complaint allegations sufficient, “neither confined to naked legal conclusions nor consistent with legal conduct.”<sup>132</sup>

#### D. Section 1983 Municipal Liability Claims

*Bell Atlantic Corp. v. Twombly*<sup>133</sup> and *Ashcroft v. Iqbal*<sup>134</sup> did not expressly overrule *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>135</sup> which held that § 1983 municipal liability claims are not

subject to a heightened pleading standard and are governed by Rule 8's notice pleading standard. Nevertheless, in the author's view, § 1983 municipal liability claims are now governed by the *Twombly-Iqbal* plausibility standard.<sup>136</sup>

#### E. Claims Subject to Qualified Immunity

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>137</sup> the Supreme Court left open the issue whether a heightened pleading standard governs personal-capacity claims against government officials subject to qualified immunity. Because the claims asserted in *Ashcroft v. Iqbal*<sup>138</sup> were in fact personal-capacity monetary liability claims subject to qualified immunity, it is now resolved that § 1983 claims subject to qualified immunity are governed by the generally applicable plausibility standard.<sup>139</sup>

The district courts have several tools to eliminate meritless personal capacity claims subject to qualified immunity early in the litigation, including ordering the plaintiff to file either a detailed reply to the defendant's answer under Federal Rule of Civil Procedure 7, or a more definite statement under Rule 12(e), or, under Rule 26(c), tailoring discovery to protect the defendant from unnecessary embarrassments or burdens.<sup>140</sup>

#### F. Conspiracy Claims

Although a conspiracy is not an element of a § 1983 claim for relief, § 1983 plaintiffs sometimes plead conspiracies in order to (1) establish state action through a conspiracy between a private party and public official,<sup>141</sup> or (2) enhance the likelihood of recovering punitive damages,<sup>142</sup> or (3) broaden the potential scope of permissible discovery and admissible evidence.<sup>143</sup> Federal courts in § 1983 actions have traditionally rejected vague and conclusory allegations of conspiracy, and required the plaintiff to allege particular and specific allegations supporting the existence of the conspiracy.<sup>144</sup> These pleading rules reflect the concerns that plaintiffs may readily plead conspiracy claims but then be unable to prove them.

In the author's view, a combined reading of *Twombly* and *Iqbal* strongly supports the conclusion that the plausibility pleading standard adopted in those cases governs § 1983 conspiracy claims. In *Twombly* the Court held that the complaint failed to allege a plausible conspiracy to violate the antitrust laws.<sup>145</sup> In *Iqbal* the Court stressed that the plau-



sibility standard governs all federal court civil complaints. The plausibility standard thus governs § 1983 conspiracy claims.<sup>146</sup>

#### G. Pro Se Complaints

The Supreme Court has not specifically addressed the applicability of the plausibility standard to pro se complaints. Prior to *Twombly*, the Court held that pro se complaints are subject to “less stringent standards than formal pleadings drafted by lawyers” and should be liberally construed in the plaintiff’s favor.<sup>147</sup> In *Erickson v. Pardus*,<sup>148</sup> decided in between *Twombly* and *Iqbal*, the Court applied the traditional notice pleading standard, and not the plausibility standard, to a pro se prisoner complaint. The Court reiterated the familiar principles that pro se complaints should be “liberally construed” and, “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”<sup>149</sup>

However, because the Court in *Erickson* did not apply the plausibility standard, it did not discuss whether or how that standard applies to pro se complaints. Perhaps a good solution is that adopted by the Sixth Circuit, which applied the plausibility standard to a pro se complaint, with the understanding that pro se complaints are held to less stringent standards than complaints drafted by lawyers, “and should therefore be liberally construed.”<sup>150</sup> Other circuits have also applied the plausibility standard to pro se complaints.<sup>151</sup>

### IV. Federal Court Jurisdiction

#### A. Subject-Matter Jurisdiction

Section 1983 itself does not grant the federal courts subject-matter jurisdiction. Federal district courts have subject-matter jurisdiction over § 1983 claims under either 28 U.S.C. § 1343(a)(3)<sup>152</sup> or the general federal question jurisdiction statute, 28 U.S.C. § 1331. Federal courts may nevertheless lack jurisdiction because of some other jurisdictional doctrine (e.g., *Rooker-Feldman*), the Eleventh Amendment,<sup>153</sup> or an abstention doctrine.<sup>154</sup>

#### B. *Rooker-Feldman* Doctrine

In some federal § 1983 actions, a party who lost in state court may try to “make a federal case of it” by seeking to overturn the state court

judgment. In these circumstances the federal court defendant is likely to seek dismissal of the federal suit for lack of jurisdiction under the “*Rooker-Feldman* doctrine,” named after the Supreme Court’s decisions in *Rooker v. Fidelity Trust Co.*<sup>155</sup> and *District of Columbia Court of Appeals v. Feldman*.<sup>156</sup> This doctrine provides that a federal district court does not have jurisdiction to review a state court judgment, even when a federal court § 1983 complaint alleges that the state court judgment violates the plaintiff’s federal constitutional rights. In creating this jurisdictional bar, the Supreme Court reasoned that because federal district courts have only original jurisdiction, they lack appellate jurisdiction to review state court judgments. In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,<sup>157</sup> the Court explained that, under 28 U.S.C. § 1257, only the Supreme Court has federal court appellate jurisdiction over state court judgments.<sup>158</sup>

The lower federal courts have struggled to determine the contours of the *Rooker-Feldman* doctrine.<sup>159</sup> In *Exxon Mobil*, the Court found that some lower federal courts had interpreted *Rooker-Feldman* “far beyond” its intended contours by “overriding Congress’ conferral of federal court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law under 28 U.S.C. § 1738.”<sup>160</sup> The Court clarified that the *Rooker-Feldman* doctrine is confined to federal court actions “brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced.”<sup>161</sup> Further, *Exxon Mobil* resolved that the *Rooker-Feldman* doctrine does not apply merely because “parallel” suits have been filed in state and federal court, even if the state suit comes to judgment during the pendency of the federal suit. The Court stressed that “‘the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.’”<sup>162</sup>

Noting that “[s]ince *Feldman*, this Court has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction,”<sup>163</sup> the *Exxon Mobil* Court emphasized the narrowness of the doctrine.<sup>164</sup> It acknowledged that the *Rooker-Feldman* doctrine does not “override or supplant” preclusion and abstention doctrines, which may be relevant when the federal court action parallels a state court suit.<sup>165</sup>

Unfortunately, the Supreme Court's decision in *Exxon Mobil* provided no guidance on the issue that has given the lower federal courts the most difficulty, namely, determining whether a federal court complaint contests the validity of a state court judgment. The federal district court will have to construe the federal complaint to determine whether the federal plaintiff is attacking the state court judgment or some other conduct. For example, in finding that the federal action was not barred by the *Rooker-Feldman* doctrine, the Second Circuit found "no basis for construing the [federal] complaint as an attack on the Family Court's order, rather than an attack on independent discretionary acts and decisions of the hospital staff that were not compelled by court order."<sup>166</sup>

On the other hand, even if a federal court claim does not expressly seek review of a state court judgment, the claim will be barred by the *Rooker-Feldman* doctrine if, as a practical matter, the federal court claim requires the federal district court to review the state court decision.<sup>167</sup>

The Ninth Circuit stated that the critical inquiry is "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment."<sup>168</sup> This principle is easy to state, though often difficult to apply.

The Third Circuit found that to determine whether a federal court plaintiff's alleged injury was caused by the state court judgment or by the conduct of the federal court defendant(s), "a useful guidepost is the timing of the injury, that is, whether the injury complained of in federal court existed *prior* to the state-court proceedings and thus could not have been caused by those proceedings."<sup>169</sup>

In *Skinner v. Switzer*,<sup>170</sup> the Supreme Court held that the plaintiff's procedural due process claim relating to access to evidence for the purpose of postconviction DNA testing could be asserted under § 1983, and need not be asserted in a federal habeas corpus proceeding.<sup>171</sup> In the course of reaching that decision, the Court held that the plaintiff's claim was not barred by the *Rooker-Feldman* doctrine because, although the Texas state courts had twice rejected Skinner's motions for postconviction access to evidence for the purpose of DNA evidence, Skinner did not challenge those adverse state court "decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed. As the Court explained in *Feldman*, and reiterated in *Exxon*, a state-court decision is not reviewable by lower federal courts,

but a statute or rule governing the decision may be challenged in a federal action.”<sup>172</sup> In other words, the Court read the complaint in *Skinner* as challenging a legislative policy rather than a state court decision.

The Supreme Court has recognized that the *Rooker-Feldman* doctrine may apply even when the claim asserted in federal court was not determined in the state court proceeding if that claim was “inextricably intertwined” with the state court judgment.<sup>173</sup> The lower federal courts have experienced difficulties applying this concept.<sup>174</sup>

The *Rooker-Feldman* doctrine does not apply to interlocutory state court orders but only to federal cases brought “after the state proceedings ended.”<sup>175</sup> It does not apply when a state court judgment is subject to appellate review.<sup>176</sup> The *Rooker-Feldman* doctrine does not apply to a federal suit brought by a plaintiff who was not a party to the state court proceeding.<sup>177</sup> In *Lance v. Dennis*,<sup>178</sup> the Supreme Court held that the *Rooker-Feldman* doctrine does not bar federal suit when the federal plaintiff was not a party to the state court judgment even if, for the purpose of preclusion, the federal plaintiff was in privity with a party to the state judgment.<sup>179</sup> As in *Exxon Mobil*, the Court in *Lance* stressed both the narrowness of the *Rooker-Feldman* doctrine and that it is distinct from preclusion. The Supreme Court has also held that the *Rooker-Feldman* doctrine does not apply when the federal court plaintiff seeks review of a state administrative or executive determination.<sup>180</sup>

### C. Supplemental Jurisdiction

In many § 1983 actions the federal court plaintiff asserts both a federal claim and one or more state law claims. In these cases, the plaintiff normally is unable to establish diversity jurisdiction over the state law claim because the parties are not citizens of different states. Nevertheless, the state law claim may come within the federal court’s supplemental jurisdiction. The supplemental jurisdiction statute, 28 U.S.C. § 1367, codifies *United Mine Workers v. Gibbs of America*’s<sup>181</sup> doctrine of pendent jurisdiction. Section 1367(a) grants the federal district courts supplemental jurisdiction over “all other claims that are so related to claims” over which the federal district court has original jurisdiction “that they form part of the same case or controversy under Article III.”<sup>182</sup> In *Gibbs*, the Supreme Court held that a pendent claim is part of an Article III

controversy when the pendent claim arises out of “a common nucleus of operative fact” with the jurisdictional-conferring claim.<sup>183</sup>

Like pendent jurisdiction, supplemental jurisdiction is a matter of both power and discretion.<sup>184</sup> Thus, § 1367(c) provides that the district court may *decline* to exercise its supplemental jurisdiction when the supplemental claim “raises a novel or complex issue of state law;” when the state law claim “substantially predominates over” the jurisdiction conferring claim;” when the district court has dismissed the jurisdiction conferring claim; or in other “exceptional circumstances.”<sup>185</sup>

To illustrate, assume that a plaintiff asserts a non-insubstantial § 1983 constitutional claim against Officer Jones. Under § 1367, the plaintiff may assert a “supplemental” state law claim arising out of the same incident against Jones. The plaintiff might also choose to assert a “supplemental” state law claim against a new “supplemental party” defendant—for example, a state law vicarious liability claim against the city, even though there is no independent jurisdictional basis for that claim.<sup>186</sup> The supplemental jurisdiction statute encompasses both pendent claim and pendent party jurisdiction.<sup>187</sup> The statute also encompasses counter-claims, cross-claims, and impleader claims.<sup>188</sup>

In *City of Chicago v. International College of Surgeons*,<sup>189</sup> the Supreme Court held that a state court judicial review claim may come within supplemental jurisdiction.<sup>190</sup> On the other hand, the supplemental jurisdiction statute does not override the Eleventh Amendment, and thus does not authorize district courts to exercise supplemental jurisdiction over claims against nonconsenting states.<sup>191</sup>

Section 1367(d) of the supplemental jurisdiction statute provides for the tolling of the limitations period for supplemental claims while they are pending in federal court and for thirty days following a federal court’s dismissal of a supplemental claim, unless state law provides for a longer tolling period.<sup>192</sup> The supplemental jurisdiction tolling provision does not apply when a federal court dismisses a supplemental claim against a state on Eleventh Amendment grounds.<sup>193</sup> However, the tolling provision does apply to claims against municipal entities.<sup>195</sup>

#### D. Removal Jurisdiction

Defendants sued in state court under § 1983 may generally remove the entire state court action to federal court.<sup>195</sup> If a state court complaint

alleges a § 1983 federal claim and a state law claim, the defendants may remove the entire state court action to federal court, and the federal court *may* exercise supplemental jurisdiction over the state law claim.<sup>196</sup> In addition, if a state court complaint asserts a § 1983 personal-capacity claim and a § 1983 claim against a state entity that is barred by the Eleventh Amendment, the defendants may still remove the action to federal court, which can hear the non-barred, personal-capacity claim.<sup>197</sup> When seeking removal, the state waives its Eleventh Amendment immunity from liability on a state law claim on which the state had already waived its sovereign immunity in the state court.<sup>198</sup>

## V. State Court Jurisdiction

State courts have concurrent jurisdiction over § 1983 claims.<sup>199</sup> When a plaintiff asserts a federal claim in state court “federal law takes the state courts as it finds them.”<sup>200</sup> In other words, “[s]tates may establish the rules of procedure governing litigation in their own courts,” such as neutral rules of procedure governing service of process and substitution of parties.<sup>201</sup> State courts, however, may not apply state rules that unduly burden, frustrate, or discriminate against the federal claim for relief. For example, a state court may not apply a state notice-of-claim requirement to a § 1983 claim because notice-of-claim provisions discriminate and unduly burden plaintiffs with claims against governmental entities.<sup>202</sup>

In state courts, as in federal courts, federal law provides the elements of the § 1983 claim for relief and the defenses to the claim, and state law may not alter either the elements or defenses.<sup>203</sup> The Supreme Court, in *Howlett v. Rose*,<sup>204</sup> held that state courts may not apply state law immunity defenses to § 1983 claims. In cases arising from state court § 1983 actions, the Supreme Court has generally held that the same federal rules that govern the litigation of § 1983 actions in federal court also govern the litigation of § 1983 actions in state court.<sup>205</sup>

## 4. Section 1983 Plaintiffs

### I. Persons Entitled to Bring Suit Under § 1983

The right to bring suit under § 1983 is available to a wide range of plaintiffs. This right is not limited to U.S. citizens. Legal and even illegal aliens are entitled to sue under § 1983.<sup>206</sup> Nor is the right to sue limited to individuals. Both for-profit and not-for-profit organizations may sue under § 1983.<sup>207</sup> However, the Supreme Court held that a Native American tribe that sought to vindicate its sovereign status was not entitled to sue under § 1983 to assert the claim.<sup>208</sup> The Court reasoned “[s]ection 1983 was designed to secure private rights against government encroachment, . . . not to advance a sovereign’s prerogative to withhold evidence relevant to a criminal investigation.”<sup>209</sup>

### II. Standing

Whether the plaintiff is a “person” entitled to sue under § 1983 is a question separate and distinct from whether the plaintiff has standing to sue. For example, Michael Newdow, who sought to challenge the constitutionality of a school policy requiring teacher-led recitation of the Pledge of Allegiance, was clearly a “person” entitled to sue under § 1983, but the Supreme Court held that he lacked standing to assert the claim.<sup>210</sup> The Court decided that Newdow could not assert the rights of his daughter because the girl’s mother, and not Newdow, had legal custody over her.

Article III has three standing requirements: (1) an actual or a threatened injury; (2) the injury is fairly traceable to the defendant’s conduct; and (3) a sufficient likelihood that a favorable decision on the merits will redress the injury.<sup>211</sup> In addition, the Supreme Court has formulated “prudential” standing requirements. The most important of the prudential rules is the rule against third-party standing that generally requires the plaintiff to assert her own rights and not the rights of a third party.<sup>212</sup>

The Supreme Court has established a specific standing doctrine when the plaintiff seeks injunctive relief. In *City of Los Angeles v. Lyons*,<sup>213</sup> a § 1983 action, the plaintiff sought both damages for a choke hold applied by a Los Angeles police officer during a traffic stop, and a permanent injunction against the City of Los Angeles to ban its police officers from using choke

holds on him unless the officer is threatened with serious harm.<sup>214</sup> The Court determined that the plaintiff had standing to seek damages from the choke hold during the traffic stop, but did not have standing to seek prospective injunctive relief.<sup>215</sup>

To establish standing for prospective relief, the Court declared that Lyons must demonstrate a realistic probability that he will again be subjected to the same injurious conduct.<sup>216</sup> The Supreme Court held that standing for injunctive relief depended on whether police officers were reasonably likely to use a choke hold on Lyons in the future.<sup>217</sup> The fact that Los Angeles police officers had used a choke hold on Lyons and others in the past was not dispositive of whether there was a sufficient probability that Lyons would be subjected to it in the future.<sup>218</sup> Nor was Lyons' subjective fear that he would again be choked without justification sufficient to confer standing.<sup>219</sup>

Speculation or conjecture that officers might subject Lyons to the choke hold in the future did not demonstrate a "real or immediate threat that the plaintiff [would] be wronged again."<sup>220</sup> Furthermore, the Court explained that the plaintiff could litigate the legality of the challenged conduct on his claim for damages. Thus, the Court discerned that the injury Lyons allegedly suffered would not go uncompensated; for that injury Lyons had an adequate remedy at law.<sup>221</sup>

The Court explained that to establish standing to seek injunctive relief, Lyons would have had to allege not only that he would have another encounter with the police, but also to make the incredible assertion either that "*all* police offices in Los Angeles *always* choke any citizen with whom they happen to have an encounter," or that "the City ordered or authorized police officers to act in such manner."<sup>222</sup> Because Lyons did not demonstrate a sufficient likelihood that he would again be subjected to the choke hold, the Court determined that he lacked standing to seek prospective relief.

When a § 1983 plaintiff seeks to enjoin a threatened criminal prosecution, to establish Article III standing, the plaintiff has to demonstrate (1) an intent to engage in the type of conduct governed by the contested penal statute; and (2) a credible threat of prosecution.<sup>223</sup>



## 5. Constitutional Rights Enforceable Under § 1983

### I. Generally

#### A. Introduction

An essential element of a § 1983 claim for relief is the establishment of a violation of a federally protected right (discussed *supra* Chapter 3, § I). This chapter analyzes federal constitutional rights enforceable under § 1983. The enforcement of federal statutory rights under § 1983 is analyzed *infra* Chapter 6. The other essential element of the § 1983 claim, action under color of state law, is covered *infra* Chapter 7.

#### B. Fourteenth Amendment Rights

Plaintiffs may enforce a wide range of federal constitutional rights under § 1983 against defendants who acted under color of state law.<sup>224</sup> The Fourteenth Amendment creates numerous rights enforceable under § 1983, namely substantive and procedural due process, the equal protection of the laws, and those rights in the Bill of Rights incorporated by the Due Process Clause of the Fourteenth Amendment. These incorporated rights include rights protected by the First Amendment, including the free speech and religion clauses (the free exercise and establishment clauses), the Second Amendment right to bear arms,<sup>225</sup> the Fourth Amendment protection against unreasonable searches and seizures, and the Eighth Amendment protection against cruel and unusual punishment.

#### C. Dormant Commerce Clause; Supremacy Clause

Section 1983 is not limited to the enforcement of Fourteenth Amendment rights, and provides a remedy for the enforcement of some other constitutional rights. In *Dennis v. Higgins*,<sup>226</sup> the Supreme Court held that the Dormant Commerce Clause, also referred to as the “negative implications” of the Commerce Clause, which imposes constitutional limitations on the power of the states to regulate interstate commerce, is enforceable under § 1983.<sup>227</sup> The Court in *Dennis* made clear that § 1983 is not limited to the enforcement of Fourteenth Amendment

rights. In *Golden State Transit Corp. v. City of Los Angeles*,<sup>228</sup> however, the Supreme Court held that the Supremacy Clause does not create rights that are enforceable under § 1983. Rather, the Supremacy Clause governs the relationship between state and federal law, and dictates that state and local laws in conflict with federal statutes are unenforceable.<sup>229</sup> When state action is alleged to violate a federal statute, the pertinent issue is whether the particular federal statutory provision creates rights enforceable under § 1983.<sup>230</sup>

#### D. Congress's Power to Preclude Constitutional Claims Under § 1983

Congress has authority to exclude the assertion of specific constitutional claims under § 1983. Although there is extensive Supreme Court decisional law concerning the enforcement of federal statutes under § 1983, there is relatively little Supreme Court decisional law on whether a federal statute can operate to preclude the assertion of a federal *constitutional* claim. In fact, the Supreme Court has held in only one case that a federal statute precluded the assertion of § 1983 constitutional claims. In *Smith v. Robinson*,<sup>231</sup> the Court held that in enacting the Education of the Handicapped Act (EHA) Congress intended to preclude the assertion of constitutional claims under § 1983 that parallel, i.e., are analogous, to statutory claims that can be asserted under the EHA.<sup>232</sup>

More recently, the Supreme Court, in *Fitzgerald v. Barnstable School Committee*,<sup>233</sup> held that Title IX of the Education Amendments of 1972, which prohibits gender discrimination in federally funded education institutions, does not prohibit the assertion of § 1983 gender discrimination claims under the Equal Protection Clause of the Fourteenth Amendment. *Fitzgerald* made clear that the Court will “not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,”<sup>234</sup> or, for that matter, as a remedy for any constitutional claim.

The Court in *Fitzgerald* stated that when a § 1983 claim is based upon a federal statutory right, evidence of a congressional intent to preclude enforcement of § 1983 “may be found directly in the statute creating the right, or inferred from the statute’s creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.”<sup>235</sup> By contrast, when

the § 1983 claim alleges a constitutional violation, lack of congressional intent [to preclude enforcement under § 1983] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights.<sup>236</sup>

The Court pointed out that in the three cases in which it held that the specific federal statute precluded the § 1983 remedy, the federal statute “required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit.”<sup>237</sup> In these circumstances, allowing plaintiffs to use the § 1983 remedy would enable them to circumvent the specific procedural requisites in the federal statute and/or obtain relief under § 1983 that is not available under the particular federal statute. Title IX, however, does not contain specific procedures individuals must pursue that would be circumvented by allowing § 1983 constitutional claims.

In addition, Title IX does not contain an *express* private claim for relief. The Court in *Fitzgerald* explained,

“[t]he provision of an *express*, private means of redress in the statute itself” is a key consideration in determining congressional intent. . . . [The Supreme] Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation. Mindful that [the Court] should “not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,” [it saw] no basis for doing so here.<sup>238</sup>

Lastly, as explained in the endnote, Title IX protections are narrower in some respects and broader in other respects than the § 1983 remedy.<sup>239</sup> The Court in *Fitzgerald* concluded that

[i]n light of the divergent coverage of Title IX and the Equal Protection Clause, as well as the absence of a comprehensive remedial scheme . . . , Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that § 1983 suits based on the Equal Protection

Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.<sup>240</sup>

E. Whether Plaintiff Has Alleged Constitutional Claim Under § 1983 Requires Interpretation of Constitution, Not § 1983

Whether the plaintiff has alleged a proper constitutional claim under § 1983 depends on the meaning of the particular constitutional provision at issue, not on an interpretation of § 1983. For example, in *Graham v. Connor*,<sup>241</sup> the Supreme Court held that all claims of excessive force during an arrest, investigatory stop, or other seizure are evaluated under a Fourth Amendment objective reasonableness standard.<sup>242</sup> The Court in *Graham* rejected the existence of “a generic ‘right’ to be free from excessive force, grounded . . . in ‘basic principles of § 1983 jurisprudence.’”<sup>243</sup> “In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.”<sup>244</sup>

Federal § 1983 complaints also frequently assert Fourth Amendment challenges to warrantless arrests. The key issue in these cases is whether the arresting officer had probable cause to arrest.<sup>245</sup> Large numbers of § 1983 complaints allege free speech retaliation claims. These claims frequently give rise to difficult legal issues and sharply contested factual issues.<sup>246</sup> The majority of these claims are asserted by present and former public employees. The key issues in these cases are whether the plaintiff’s speech was pursuant to her official duties; whether the plaintiff’s speech was a matter of public concern; whether the defendant took adverse action against the plaintiff for engaging in protected speech; and whether the governmental interest outweighs the plaintiff’s free speech interests.<sup>247</sup> First Amendment retaliation claims are also asserted by government contractors, individuals subject to criminal prosecution, prisoners, and landowners, among others.

F. Conspiracies

An allegation of a conspiracy does not itself state a claim for relief under § 1983; the plaintiff must also allege a constitutional deprivation.<sup>248</sup> In other words, without a deprivation of a constitutional right, conspiracy allegations do not give rise to a § 1983 claim.

G. State Law Rights Not Enforceable Under § 1983

State law rights are not enforceable under § 1983.<sup>249</sup> When governmental conduct is not proscribed by a textually explicit provision of the Bill of Rights, the Supreme Court has generally rejected substantive due process protection and left the plaintiff to available state tort remedies.<sup>250</sup> For example, in *Estelle v. Gamble*,<sup>251</sup> the Supreme Court held that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner.”<sup>252</sup> In *Baker v. McCollan*,<sup>253</sup> the Court held that “[f]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.”<sup>254</sup> Similarly, in *Paul v. Davis*,<sup>255</sup> the Court held that defamation by a government official does not itself violate the Constitution.<sup>256</sup> It stated that § 1983 is not a “font of tort law to be superimposed upon whatever systems may already be administered by the States.”<sup>257</sup>

In *Collins v. City of Harker Heights*,<sup>258</sup> the Supreme Court held that a claim that the city breached its duty of care to its employees by failing to provide a safe working environment was “analogous to a fairly typical state law tort claim” and was not cognizable under § 1983.<sup>259</sup> The Court stated:

Because the Due Process Clause “does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society” . . . we [reject] claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.<sup>260</sup>

In some cases, however, state law may have a significant, even decisive, impact on a federal constitutional right. Whether the plaintiff has a protected property interest for the purpose of the Due Process Clause of the Fourteenth Amendment depends on whether state law creates a reasonable expectation in the particular interest. In *Board of Regents v. Roth*,<sup>261</sup> the Supreme Court held that “[p]roperty interests . . . are not created by the Constitution” but by sources of state law “that support claims of entitlement to” state-created benefits and interests.<sup>262</sup> Further, Supreme Court decisional law holds that when the deprivation of property or liberty results from “random and unauthorized” governmental action, the availability of an adequate state postdeprivation judicial remedy will satisfy procedural due process.<sup>263</sup>

The following sections contain discussions of selected constitutional rights asserted on a fairly recurring basis in federal court § 1983 actions.

## **II. Due Process Rights: In General**

The Due Process Clause of the Fourteenth Amendment encompasses three kinds of federal claims enforceable under 42 U.S.C. § 1983: (1) claims for the deprivation of those rights in the Bill of Rights made applicable to the states through incorporation; (2) claims under the substantive component of the Due Process Clause, which “bars certain arbitrary, wrongful government actions, ‘regardless of the fairness of the procedures used to implement them’”;<sup>264</sup> and (3) claims under the procedural component of the Due Process Clause, which prohibits the deprivation of life, liberty, or property without fair procedure.<sup>265</sup>

When a plaintiff asserts a violation of an incorporated right or a right protected under the substantive component of the Due Process Clause, the violation is complete at the time of the challenged conduct, and the § 1983 remedy is available, regardless of remedies provided under state law.<sup>266</sup> In contrast, when the plaintiff asserts a violation of procedural due process, an available state remedy may provide adequate process, and serve to defeat the procedural due process claim.

## **III. Procedural Due Process**

A § 1983 claim based on denial of procedural due process challenges the constitutional adequacy of state law procedural protections accompanying an alleged deprivation of a constitutionally protected interest in life, liberty, or property. The deprivation of life, liberty, or property alone is a necessary, but not sufficient, condition; to be actionable, the deprivation must have been without adequate process.

### **A. Two-Step Approach**

A procedural due process analysis addresses two questions. The “first asks whether there exists a [life,] liberty or property interest which has been interfered with by the state; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.”<sup>267</sup> A court encountering a procedural due process claim must first determine whether the plaintiff has been deprived of a life, liberty, or property interest that is protected by the Due Process Clause.<sup>268</sup>

While liberty interests may be either derived directly from the Due Process Clause of the Constitution,<sup>269</sup> or created by state law,<sup>270</sup> property interests “are created from an independent source such as state law.”<sup>271</sup>

## B. Property

In *Board of Regents v. Roth*,<sup>272</sup> the Supreme Court provided the following guidance for determining when a party has a property interest safeguarded by procedural due process:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

...

Property interests . . . are not created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>273</sup>

An individual has a “legitimate claim of entitlement” to a government dispensed commodity when the state establishes fairly objective standards of eligibility for receiving the commodity. The Supreme Court has found protected property interests in a variety of government dispensed commodities made available to those who satisfy objective eligibility standards, including public assistance,<sup>274</sup> Social Security disability benefits,<sup>275</sup> driver’s licenses,<sup>276</sup> public school education,<sup>277</sup> municipal furnished utility services,<sup>278</sup> and public employment.<sup>279</sup> On the other hand, the Supreme Court held that there was no property interest in police enforcement of a domestic abuse restraining order, even though the order and a state statute were couched in mandatory terms requiring police enforcement.<sup>280</sup> The Court determined that the mandatory language had to be read together with the tradition of broad discretion afforded law enforcement officers.<sup>281</sup> In addition, except in the area of public employment, federal courts have been reluctant to find that a private party’s contract with a state or municipality creates a protected property interest, because doing so runs the risk that routine breach-of-contract claims could be converted into § 1983 due process claims.<sup>282</sup>

### C. Liberty: Prisoners' Rights Cases

Prisoners' rights cases frequently require a determination of whether the plaintiff has suffered a deprivation of liberty. In *Sandin v. Conner*,<sup>283</sup> an inmate placed in disciplinary segregation for thirty days asserted a violation of procedural due process. The Supreme Court held that, despite the mandatory language of the applicable prison regulation, a prisoner's constitutionally protected liberty interest will generally be "limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."<sup>284</sup> Courts must also look to the substance of the deprivation and assess the hardship imposed on the inmate relative to the ordinary incidents of prison life.<sup>285</sup>

Courts normally decide whether the discipline imposed "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" as a matter of law. However, some decisions recognize that the issue can involve factual determinations.<sup>286</sup> But even when there are factual issues, "the ultimate issue of atypicality is one of law."<sup>287</sup>

*Sandin* did not disturb the Court's decision in *Wolff v. McDonnell*,<sup>288</sup> which held that a state may create a liberty interest on the part of inmates in the accumulation of good-conduct time credits.<sup>289</sup> Thus, if disciplinary action would inevitably affect the duration of the inmate's confinement, a liberty interest would be recognized under *Wolff*.<sup>290</sup> Likewise, prisoners' claims not based on procedural due process, such as First Amendment retaliatory transfer or retaliatory discipline claims, are not affected by *Sandin*.<sup>291</sup>

In *Wilkinson v. Austin*,<sup>292</sup> the Supreme Court acknowledged that "[i]n *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system."<sup>293</sup> The Court found it unnecessary to resolve that issue because it found that placement of the plaintiff prisoner in a "supermax facility" imposed "atypical and significant hardship under any plausible baseline."<sup>294</sup>

### D. Liberty: "Stigma Plus" Claims

In *Paul v. Davis*,<sup>295</sup> the Supreme Court held that mere government injury to an individual's reputation is not a deprivation of liberty. However,



a deprivation of liberty arises if the injury to reputation occurs in conjunction with the deprivation of some tangible interest, even if the tangible interest is not itself a protected property interest, such as “at will” public employment.<sup>296</sup> This is known as the “stigma-plus” doctrine. Under this doctrine, to establish a deprivation of liberty for the purpose of a procedural due process claim, the plaintiff must demonstrate government publication of the stigma in conjunction with the deprivation of a tangible interest. In this context, procedural due process requires that the stigmatized individual be afforded a name-clearing hearing, i.e., an opportunity to clear her good name and reputation. The “stigma-plus” doctrine has been the subject of extensive lower court decisional law.<sup>297</sup>

#### E. Procedural Safeguards

Once a protected due process property or liberty interest has been identified, a court must examine the process that accompanies the deprivation of that protected interest and decide whether the available procedural safeguards are constitutionally adequate.<sup>298</sup> The procedural safeguards that must accompany a state’s deprivation of a constitutionally protected interest is a matter of federal law.<sup>299</sup>

##### 1. *Eldridge* Balancing

When the procedural due process claim contests the adequacy of notice, the court must determine whether the § 1983 plaintiff was given “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [proceeding] and afford them an opportunity to present their objections.”<sup>300</sup> When the procedural due process claim concerns some aspect of the opportunity to be heard, the courts employ the *Mathews v. Eldridge*<sup>301</sup> balancing formula to determine the procedures required by the Due Process Clause.

In *Eldridge*, the Court set forth three factors to be weighed in determining the sufficiency of procedural safeguards accompanying deprivations caused by the government:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government’s interest, including the function involved and the fiscal and administrative

burdens that the additional or substitute procedural requirements would entail.<sup>302</sup>

Federal courts normally determine the procedures required by *Eldridge* balancing as a matter of law. As a general rule, due process requires some type of notice and an opportunity to be heard *prior* to the deprivation of a protected interest.<sup>303</sup> In certain circumstances, however, an adequate postdeprivation remedy satisfies procedural due process. The Supreme Court held that a state did not violate the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending without pay a university police officer who had been arrested and charged with drug possession.<sup>304</sup> Although due process normally requires the government to provide an informal opportunity to be heard before discharging an employee,<sup>305</sup> the Court found that the arrest of the plaintiff-employee; the filing of charges by a third party; and the employer's need to expeditiously dismiss employees in a position of "great public trust" strongly weighed against granting a predeprivation hearing.<sup>306</sup>

## 2. *Parratt-Hudson* Doctrine

A due process claim may be based on a deprivation of life, liberty, or property by state officials acting pursuant to an established state procedure that failed to provide for predeprivation process.<sup>307</sup> In this situation, procedural due process generally requires a predeprivation hearing if the challenged conduct was "authorized," the erroneous deprivation foreseeable, and predeprivation process was practicable.<sup>308</sup>

In contrast, under the *Parratt-Hudson* doctrine,<sup>309</sup> there is no procedural due process violation where the deprivation was unforeseeable, random, and unauthorized, and where the state provided an adequate postdeprivation remedy.<sup>310</sup> This doctrine represents a "special case of the general *Mathews* analysis, in which adequate post-deprivation tort remedies are all the process that is due, simply because they are the only remedies that the state could be expected to provide."<sup>311</sup> In other words, when the deprivation is the result of random and unauthorized action by a state official, it is not normally possible for the state to provide predeprivation process because the state cannot predict when the deprivation will occur.<sup>312</sup>

Although the Supreme Court has distinguished between claims contesting the established state procedure and claims challenging random and unauthorized acts, it is not always easy to determine whether an official's conduct is "random and unauthorized."<sup>313</sup> In *Zinerman v. Burch*,<sup>314</sup> the plaintiff, Darrell Burch, was admitted to a state mental hospital as a "voluntary" patient under circumstances that clearly indicated he was incapable of informed consent. Burch alleged that his five-month hospitalization deprived him of liberty without due process of law. In holding that Burch's complaint did not allege random and unauthorized conduct, and was sufficient to state a procedural due process claim, the Supreme Court stated:

Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.<sup>315</sup>

The Court in *Zinerman* found that the *Parratt-Hudson* doctrine did not apply because the officials had authority to deprive individuals of their liberty; the deprivations were, therefore, not unpredictable; and it was not impossible for the state to provide predeprivation process.<sup>316</sup>

*Actions by High-Ranking Officials.* There is a split in the circuits as to whether the *Parratt-Hudson* doctrine applies to actions by "high-ranking" officials. The First, Fifth, and Seventh Circuits hold that the actions of high-ranking officials may be "random and unauthorized," and thus subject to the *Parratt-Hudson* doctrine.<sup>317</sup> The Second Circuit, however, holds that the decisions of high-ranking officials "more closely resemble established state procedures than the haphazard acts of individual state actors."<sup>318</sup>

#### IV. Substantive Due Process Claims

In addition to providing procedural due process protection, the Due Process Clause imposes certain substantive limitations on the power of state and local government to deprive individuals of life, liberty or property.

In other words, substantive due process bars “certain government actions regardless of the fairness of the procedures used to implement them.”<sup>319</sup>

Substantive due process has been employed by the Supreme Court in two different manners. It has been the basis for implying some fundamental constitutional rights. It has also afforded protection against especially egregious, arbitrary governmental action.

In some cases the Supreme Court has invoked substantive due process as the basis for implying fundamental constitutional rights and invoking heightened judicial scrutiny. These fundamental protections afforded by the substantive component of the Due Process Clause have generally been limited to personal autonomy and privacy “matters relating to marriage, family, procreation, and the right to bodily integrity.”<sup>320</sup> Because “the guideposts for responsible decision making in this [uncharted] area [of substantive due process] are scarce and open-ended,”<sup>321</sup> the Supreme Court has expressed a reluctance to expand the scope of substantive due process protection.<sup>322</sup> Whenever “an explicit textual source of constitutional protection” addresses particular governmental behavior, courts must rely on the more explicit source of protection to analyze the claim, rather than the more general and open-ended concept of substantive due process.<sup>323</sup>

However, substantive due process may also provide protection when egregious governmental conduct is not forbidden by either the explicit provisions of the Bill of Rights or by an implied fundamental constitutional right (such as the right to privacy, to the extent it has been recognized). For example, substantive due process protects individuals who have been subjected to excessive force in a nonseizure, nonprisoner context because neither the Fourth Amendment nor Eighth Amendment applies.<sup>324</sup> Substantive due process may thus be viewed as affording individuals a type of residual protection against egregious governmental wrongdoing.

#### A. Shocks the Conscience

The Supreme Court, in *County of Sacramento v. Lewis*,<sup>325</sup> ruled that the substantive due process standard depends on whether the plaintiff is challenging legislative action or executive action and, if the challenge is to executive action, the type of executive action. When the challenge is to legislative action and the legislative policy does not infringe upon a fundamental constitutional right, the test is whether the legislative policy is reasonably related to a legitimate governmental interest.<sup>326</sup>

When, as in *County of Sacramento*, the challenge is to executive action, the question is whether the government action is shocking to the judicial conscience.<sup>327</sup>

*County of Sacramento* divided executive actions into two categories. When the executive official had time to deliberate, but the official was nevertheless deliberately indifferent, the deliberate indifference “shocks the conscience” and thus violates substantive due process. The Court gave, as an example of executive action with time to deliberate, the provision of medical care to detainees.<sup>328</sup> On the other hand, when executive officers did not have time to deliberate, their actions shock the conscience only if they acted with a purpose to cause harm that is unrelated to a legitimate law enforcement interest. The officers in *County of Sacramento* were involved in a high-speed police pursuit and did not have a realistic opportunity to deliberate. The Court held that their actions did not violate substantive due process because the officers did not act with a purpose to cause harm unrelated to a legitimate law enforcement interest.

The “shocks the conscience” test governs all substantive due process challenges to executive action not implicating a fundamental, constitutionally protected right.<sup>329</sup> The standard is extremely demanding, and challenges to executive action under it rarely succeed.<sup>330</sup> Negligence is “never sufficient” to show that official conduct shocks-the-conscience.<sup>331</sup> Further, the mere fact that a state or local official violated state law does not mean that the official violated substantive due process. The Supreme Court stated that “errors of state law do not automatically become violations of due process.”<sup>332</sup> Moreover, “[n]ot all arbitrary and capricious state action amounts to a violation of substantive due process; ‘otherwise judicial review for compliance with substantive due process would become the equivalent’” of a typical state law judicial review claim.<sup>333</sup>

In 2009, after a decade of police pursuit litigation under the *County of Sacramento*’s substantive due process standard, the Sixth Circuit was unable to find any federal court decision “in which an officer’s actions in a police chase have ultimately been found to shock the conscience. . . .”<sup>334</sup>

In some cases the district judge may be able to decide that, as a matter of law, the contested conduct does not violate substantive due process because a reasonable jury could not find that the conduct shocks

the conscience.<sup>335</sup> In *County of Sacramento*, the Court held that the complaint allegations did not state a substantive due process claim. However, in cases where the complaint allegations satisfy the shock-the-conscience standard, and the evidence allows a reasonable jury to find that the contested conduct was conscience shocking, the issue should be submitted to the jury under instructions incorporating the *County of Sacramento* standards.

B. *District Attorney's Office v. Osborne*

In *District Attorney's Office v. Osborne*,<sup>336</sup> the Supreme Court rendered an important decision rejecting a criminal defendant's claims that the state's denial of access to evidence for the purpose of postconviction DNA testing violated his substantive and procedural due process rights. In rejecting these due process claims, the Court relied heavily on the pervasive legislative enactments governing postconviction DNA, reasoning that recognizing a due process right to postconviction DNA testing "would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause,"<sup>337</sup> thereby, "short-circuit[ing] what looks to be a prompt and considered legislative response."<sup>338</sup>

In rejecting Osborne's procedural due process claim, the Court held that the prosecutor's due process obligation, under *Brady v. Maryland*,<sup>339</sup> to disclose exculpatory material to the defense is a fair trial right that does not apply postconviction. Further, the Court ruled that although "noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law,"<sup>340</sup> Osborne did have a state-created liberty interest in demonstrating his innocence.<sup>341</sup> However, because a convicted defendant found guilty after a fair trial has a significantly diminished liberty interest compared to a presumptively innocent person, "[t]he State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief."<sup>342</sup> "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided."<sup>343</sup> The Court found that Alaska's postconviction procedures were facially adequate to obtain access to evidence for DNA testing, and that Osborne did not

demonstrate that Alaska's postconviction procedures were inadequate in operation. It stated:

This is not to say that Osborne must exhaust state-law remedies. See *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 500–501 . . . (1982). But it is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.<sup>344</sup>

This aspect of the analysis in *Osborne* is consistent with the position of numerous lower federal courts that § 1983 claimants who allege procedural due process claims must pursue the available procedures and demonstrate their inadequacy.<sup>345</sup> This is not considered an exhaustion requirement, but is in effect an element of a procedural due process claim.

The Court also rejected Osborne's claimed substantive due process right to postconviction DNA testing. Reiterating its strong reluctance to expand substantive due process rights, the Court found "no long history of . . . a right [to postconviction DNA testing], and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'"<sup>346</sup>

#### C. Professional Judgment

The federal courts have applied a "professional judgment" standard to certain substantive due process claims. The Supreme Court articulated this standard in *Youngberg v. Romeo*,<sup>347</sup> holding that state officials are liable for treatment decisions concerning involuntarily committed mental patients only if the officials' decisions were "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."<sup>348</sup> Some courts have applied the professional judgment standard to due process claims asserted on behalf of involuntarily placed foster children.<sup>349</sup> Most courts, however, have applied the deliberate indifference standard to these claims.<sup>350</sup>

#### D. *DeShaney* and Affirmative Duty Cases

In *DeShaney v. Winnebago County Department of Social Services*,<sup>351</sup> the Supreme Court held that the Due Process Clause of the Fourteenth

Amendment generally does not create an affirmative duty on the part of the state to “protect the life, liberty, and property of its citizens against invasion by private actors.”<sup>352</sup> The Court concluded that “[a]s a general matter . . . a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”<sup>353</sup> In other words, the Due Process Clause prohibits the state from engaging in certain conduct that deprives individuals of life, liberty, or property, but it does not generally require the state to engage in affirmative actions to protect individuals from being harmed by third parties, even when the state is aware of the risk of harm and may have the ability to prevent it. Nor does the Due Process Clause generally impose an obligation on the State to provide individuals with essential services such as police and fire protection, or other necessities. Thus, the Court in *DeShaney* held that the state did not have a due process duty to protect Joshua DeShaney from being abused by his father, even though the state at one point took Joshua into its custody, and state officials were aware of the risk of harm.

However, *DeShaney* recognized that the state has an affirmative “duty to protect” a person whom the state has incarcerated or involuntarily institutionalized.<sup>354</sup> Plaintiffs who have not been incarcerated or involuntarily institutionalized may assert substantive due process duty-to-protect claims based on allegations that: (1) the plaintiff was in the “functional custody” of the state when harmed, or (2) the state created or increased the danger to which the plaintiff was exposed. The Supreme Court’s decision in *DeShaney* has generated a tremendous amount of lower court decisional law.<sup>355</sup>

#### 1. Functional Custody: Foster Care; Public School

When a § 1983 plaintiff asserts a violation of the state’s “affirmative due process” duty to protect, grounded in the concept of state “custody,” a number of courts have taken the position that the plaintiff must have been *involuntarily* in the state’s custody when harmed.<sup>356</sup> In *DeShaney*, the Court acknowledged that a situation in which the state removes a child from “free society” and places him or her in a foster home might be “sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”<sup>357</sup> The federal circuit courts since *DeShaney* have consistently recog-



nized that the states have a due process duty to protect foster children involuntarily placed by the state in foster care.<sup>358</sup>

On the other hand, the circuits have consistently rejected arguments that public schoolchildren, by virtue of compulsory attendance laws, are in the “functional custody” of the state during school hours.<sup>359</sup> These decisions hold that the state does not have a duty to protect students from harm inflicted by fellow students or other private actors.<sup>360</sup> The dominant rationale of these decisions is that even while in public school, the student remains in her parents’ custody. Courts have likewise rejected the notion that individuals in public housing<sup>361</sup> or employees of a public entity<sup>362</sup> are in the “functional custody” of the state and thus owed an affirmative duty of protection. In *Collins v. City of Harker Heights*,<sup>363</sup> the Supreme Court unanimously held that “the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace.”<sup>364</sup>

## 2. State-Created Danger

In holding that the state had not deprived Joshua DeShaney of any constitutionally protected rights, the Supreme Court suggested that the result might have been different if the state had played a role in creating the dangers to which Joshua was exposed, or if it had increased his vulnerability to these dangers.<sup>365</sup> While *DeShaney* makes clear that the state’s mere awareness of a risk of harm to an individual will not suffice to impose an affirmative duty to provide protection,<sup>366</sup> most courts of appeals hold that if the state creates the danger confronting the individual, it may then have a corresponding duty to protect.<sup>367</sup> Moreover, the Supreme Court’s decision in *Collins*—that there is no substantive due process right to a safe work environment<sup>368</sup>—does not necessarily preclude the imposition of constitutional liability on state officials who deliberately or intentionally place public employees in a dangerous situation without adequate protection.<sup>369</sup>

## V. Use of Force by Government Officials: Sources of Constitutional Protection

Government officials may be subject to § 1983 lawsuits when they use unjustified force to control criminal suspects, pretrial detainees, and con-

victed prisoners. The source of the right for claims against these officials depends on the plaintiff's status at the time the officials used force: the Fourth Amendment<sup>370</sup> applies to arrestees and other "seized" individuals and prohibits the use of unreasonable force;<sup>371</sup> the Due Process Clause applies to pretrial detainees and protects them against "excessive force that amounts to punishment";<sup>372</sup> and the Eighth Amendment<sup>373</sup> applies to convicted prisoners and prohibits cruel and unusual punishment.<sup>374</sup> Because the Fourth and Eighth Amendment rights have been incorporated by the Due Process Clause of the Fourteenth Amendment, state and local officials are subject to § 1983 lawsuits under these amendments.

Under the substantive due process component of the Fourteenth Amendment, use-of-force claims are actionable if they constitute a deprivation of "liberty . . . without due process of law."<sup>375</sup> A substantive due process claim challenging the use of force may lie only if neither the Fourth nor the Eighth Amendment applies.<sup>376</sup> For example, if the use of force constituted a "seizure" within the meaning of the Fourth Amendment, the claim must be analyzed only under the Fourth Amendment objective "reasonableness" standard.<sup>377</sup> In other words, the textually explicit Fourth Amendment protection preempts the more generalized substantive due process protection. In fact the Fourth Amendment "objective reasonableness" standard for evaluating excessive force claims is less demanding than the substantive due process "shock the conscience" standard.<sup>378</sup> In contrast, if officers engaged in a high-speed pursuit did *not* "seize" the § 1983 claimant, the Fourth Amendment would not apply, and the use-of-force claim may be actionable only under the substantive due process component of the Fourteenth Amendment.<sup>379</sup>

Although the "Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment,"<sup>380</sup> the Supreme Court has "not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins . . . ."<sup>381</sup> The courts of appeals are in conflict over whether the Fourth Amendment or due process provides protection against force used after an arrest and before pretrial detention.<sup>382</sup>

#### A. Unreasonable Force Claims Under the Fourth Amendment

Whether a police officer's use of force violated the Fourth Amendment depends on the resolution of two issues: (1) In using force, did the official "seize" the suspect within the meaning of the Fourth Amendment?<sup>383</sup> and, if so, (2) Was the force objectively unreasonable?<sup>384</sup> If an officer both seized the plaintiff and used objectively unreasonable force, then the plaintiff has established a Fourth Amendment violation. If no seizure occurred, then the use of force is not actionable under the Fourth Amendment. The force, however, might be actionable under the substantive due process protection of the Fourteenth Amendment.<sup>385</sup> Resolving these two issues requires scrutiny of the Supreme Court's definition of a "seizure" and of "objectively unreasonable" force.

The Supreme Court has articulated the following tests for determining when officers have seized an individual:

1. Whether "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."<sup>386</sup>
2. Whether, as a result of an official show of authority, a "reasonable person would have believed that he was not free to leave," and the person in fact submitted to the assertion of authority.<sup>387</sup>
3. Whether there was "a governmental termination of freedom of movement through means intentionally applied."<sup>388</sup>

These definitions focus on the assertion of governmental authority and the use of physical force. When officers use physical force, the first and third definitions of seizure are applicable. The first definition simply states that the use of physical force can effectuate a seizure; the third definition requires that the application of force be "intentional." Thus, if a police officer accidentally hits someone with his vehicle, the officer used physical force, but no seizure occurred because the force was not intentional.<sup>389</sup> Most § 1983 Fourth Amendment excessive force claims arise out of use of force by police during arrests or stops, which are clearly "seizures." On the other hand, not all intentional uses of force by law enforcement officials are "seizures." For example, the Tenth Circuit held that a suspect who was shot by a deputy sheriff, but continued his flight by climbing over a fence and fleeing the scene, was not seized within the meaning of the Fourth Amendment.<sup>390</sup> A seizure requires

termination of an individual's freedom of movement or acquisition of physical control.

As discussed in the following subsections, assuming that there has been a seizure, the issue becomes whether the officer's use of force in effectuating the seizure was objectively reasonable. A model jury instruction for a Fourth Amendment excessive force claim is in the Appendix (*see infra* Model Instruction 2).

### 1. *Tennessee v. Garner*

Determining whether officers used unreasonable force under the Fourth Amendment when they seized a suspect is a fact-specific inquiry. In *Tennessee v. Garner*,<sup>391</sup> the Supreme Court held that the use of deadly force was objectively unreasonable where a police officer, who had reason to believe that a suspect had just burglarized a home, commanded the fleeing suspect to stop, and shot and killed him when he did not obey the officer's command.<sup>392</sup> The Court held that a governmental policy that allows the use of deadly force against *all* fleeing felons violates the Fourth Amendment; the use of deadly force is reasonable only if the officer has probable cause to believe that the suspect poses a risk of serious harm to the officer or others.<sup>393</sup> The Court stated that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."<sup>394</sup> Because burglary does not necessarily involve the infliction of "serious physical harm and because the suspect posed no danger to the officer or the community, the officer's use of deadly force violated the Fourth Amendment."<sup>395</sup>

The courts of appeals have prescribed caution in relying on the officer's version of a deadly force encounter when the victim is not available to counter it. For example, in *Scott v. Henrich*,<sup>396</sup> the Ninth Circuit stated:

Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.

The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts. In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.<sup>397</sup>

## 2. *Graham v. Connor*

In *Graham v. Connor*,<sup>398</sup> the Supreme Court extended *Garner*'s "objective reasonableness" standard to any use of force by a law enforcement officer during an arrest, investigatory stop, or other seizure. The Court held "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."<sup>399</sup> To determine the reasonableness of the force employed, courts must consider "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>400</sup> The Court did not intend that these be the exclusive factors that may be relevant to the reasonableness inquiry. Courts must afford the officers some deference because they often have to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."<sup>401</sup> This reasonableness inquiry is an objective one: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."<sup>402</sup> Although plaintiffs need not prove that officers acted in bad faith in order to demonstrate that the use of force violated the Fourth Amendment,<sup>403</sup> such evidence may be admissible to impeach the officers' credibility, or on the question of punitive damages.<sup>404</sup>

When multiple officers are sued on a Fourth Amendment excessive force claim, the district court must evaluate each officer's liability separately.<sup>405</sup> Where possible, courts should parse different or multiple uses of force.<sup>406</sup> Lower federal courts commonly exclude evidence of police department directives on appropriate use of force on the rationale that the pertinent issue is whether the officer acted in an objectively reasonable manner under the Fourth Amendment, not whether officer complied with police department directives.<sup>407</sup>

### 3. *Scott v. Harris*

In *Scott v. Harris*,<sup>408</sup> the Supreme Court applied the Fourth Amendment "objective reasonableness" standard to a police officer's use of force to end a high-speed police pursuit. The Court held that the defendant "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."<sup>409</sup>

The plaintiff, Victor Harris, was traveling seventy-three miles per hour in a fifty-five-mile-per-hour zone. The defendant, Deputy Sheriff Timothy Scott, activated his blue lights and siren, but Harris failed to pull over, instead accelerating his speed. The videotape of the chase made from the pursuing police cruiser showed Harris's

vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. . . . Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.<sup>410</sup>

Deputy Scott had initially decided to terminate the encounter by employing a "Precision Intervention Technique" (PIT) maneuver, which causes a fleeing vehicle to spin to a stop, but instead "applied his push bumper to the rear of [Harris's] vehicle. As a result, [Harris] lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. [Harris] was badly injured and was rendered quadriplegic."<sup>411</sup>

The majority of the Court, in an opinion by Justice Antonin Scalia, found that Deputy Scott's actions constituted a seizure because

the officer terminated Harris's freedom of movement through the means intentionally applied, namely, ramming his car from behind.<sup>412</sup> The Court held, however, that the seizure did not violate the Fourth Amendment because it was objectively reasonable. Significantly, the summary judgment evidence included the videotape of the chase made from the pursuing police cruiser; the Court posted the video on its website. In his concurring opinion, Justice Stephen G. Breyer, found that the videotape made a difference, and urged the reader to view it.

Excessive force cases often present genuine disputed issues of material facts that make resolution on summary judgment inappropriate. In *Scott*, however, the Court held that the videotape enabled resolution of the case in favor of the defendant on summary judgment. There were no allegations or indications that the videotape was doctored or altered, or that it distorted the incident.<sup>413</sup> The plaintiff's version of the incident was "so utterly discredited" by the videotape "that no reasonable jury could have believed him."<sup>414</sup> The Court ruled that when, as in *Scott*, the material facts are not in dispute, the reasonableness of the use of force "is a pure question of law."<sup>415</sup> Even so, it had to "slosh . . . through the factbound morass of 'reasonableness.'"<sup>416</sup>

The Court distinguished *Tennessee v. Garner*,<sup>417</sup> in which the Court had held that it was unreasonable for the police

to kill a "young, slight, and unarmed" burglary suspect, by shooting him 'in the back of the head' while he was running away on foot, and when the officer "could not reasonably have believed that [the suspect] . . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape."<sup>418</sup>

*Scott* stressed that the "necessity" for using deadly force referred to in *Garner* was not the necessity of preventing escape, but the necessity of preventing serious physical harm to the officers or others.<sup>419</sup> *Scott* did not involve a police officer's shooting of an unarmed, nonthreatening suspect, but an officer's bumping a fleeing motorist whose flight posed an extreme danger to innocent individuals.

The Court in *Scott* said that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's

actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test to the use of a particular type of force in a particular situation.”<sup>420</sup> The *Scott* Court further ruled that, in assessing the reasonableness of the officer’s use of force, it is appropriate to consider the relative culpability of the parties. It was significant that Harris

intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing [Harris] for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent.<sup>421</sup>

The Court also ruled that the police were not required to take the chance of calling off the pursuit and hoping for the best: “Whereas Scott’s action—ramming [Harris] off the road—was *certain* to eliminate the risk that [Harris] posed to the public, ceasing pursuit was not. . . . [T]here would have been no way to convey convincingly to [Harris] that the chase was off, and that he was free to go.”<sup>422</sup> Furthermore, the Court said that it was

loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people’s lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. . . . Instead, we lay down a more sensible rule: A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.<sup>423</sup>

The Court thus held that, because the car chase that Harris initiated posed substantial and immediate risk of serious physical injury to others, Deputy Scott’s attempt to terminate the chase by forcing Harris off the road was reasonable. Since no reasonable jury could find otherwise, Scott was entitled to summary judgment.



Justice Ruth Bader Ginsburg, concurring, did not read the Court's opinion as creating a mechanical *per se* rule, but rather as based on a fact-specific evaluation of reasonableness.<sup>424</sup> By contrast, Justice Breyer read the Court's decision as articulating a *per se* rule, namely, "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."<sup>425</sup> Breyer found that this statement by the majority "is too absolute," and that "whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects."<sup>426</sup> Justice John Paul Stevens, the sole dissenter, opined that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury,"<sup>427</sup> and that the Court in this case usurped the function of the jury by adopting a "*per se* rule that presumes its own version of the facts."<sup>428</sup>

The most significant aspect of the Supreme Court's decision in *Scott* is the ruling that an accurate videotape depicting the encounter between the plaintiff and the officer may provide the basis for resolving the § 1983 excessive force claim on summary judgment. Numerous lower court decisions have applied this aspect of *Scott*.<sup>429</sup>

#### 4. Specific Types of Force

Federal appellate court case law adjudicating § 1983 Fourth Amendment excessive force claims is so extensive that decisions can be grouped according to specific types of force—for example, handcuffing,<sup>430</sup> pepper spray,<sup>431</sup> canine force,<sup>432</sup> and Tasers. Recent years have seen a large increase in § 1983 excessive force Taser cases.<sup>433</sup> A Taser or stun gun is "a non-lethal device commonly used to subdue individuals resisting arrest. It sends an electric pulse through the body of the victim causing immobilization, disorientation, loss of balance and weakness. It leaves few, if any, marks on the victim."<sup>434</sup> As discussed in the next subsection, the lower court decisional law has generated an array of issues yet to be resolved by the Supreme Court.

## 5. Other Fourth Amendment Excessive Force Issues

### *a) Officer's Conduct Prior to Use of Force*

The circuit courts have taken different positions on whether an officer's conduct prior to the use of force should be considered in evaluating the objective reasonableness of his actions.<sup>435</sup> Some courts "freeze the time frame" and consider only actions immediately before force was used, holding that the officer's preshooting conduct is "not relevant and inadmissible."<sup>436</sup> In the Second Circuit the "[shooting officer's] actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."<sup>437</sup> The Second Circuit considers only "the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."<sup>438</sup> By contrast, the First Circuit considers "the actions of the government officials leading up to the seizure," not just at the moment of the shooting.<sup>439</sup>

The Third Circuit holds that the circumstances considered in evaluating the objective reasonableness of the force used should not automatically exclude "all context and causes prior to the moment" force is employed because, after all, "[h]ow is the reasonableness of a bullet striking someone to be assessed if not by examining the preceding events?"<sup>440</sup> As a slight variation, the Tenth Circuit holds that consideration may be given to the police officer's conduct in the moments leading up to the *suspect's* threat to use force if the officer's conduct was so "immediately connected" to the suspect's threat that it should be considered in evaluating the reasonableness of the officer's forceful response.<sup>441</sup> The Sixth Circuit takes a similar approach.<sup>442</sup>

### *b) Officer's Mistake of Fact*

Two recent courts of appeals decisions analyze how an officer's mistake of fact should be evaluated when a Fourth Amendment, excessive force claim is subject to qualified immunity. In *Henry v. Purnell*,<sup>443</sup> the Fourth Circuit held that a police officer's shooting of a nonthreatening individual suspected of a misdemeanor, where the officer intended to use his Taser rather than his gun, violated clearly established Fourth Amendment law. The officer was thus

not entitled to summary judgment on the basis of qualified immunity. It was not objectively reasonable for the officer to believe he had drawn his Taser rather than his Glock. The Taser was “a foot lower” than the Glock, half its weight, and “had a thumb safety that had to be flipped to arm” it.<sup>444</sup> The court concluded:

In the end, this may be a case where an officer committed a constitutionally unreasonable seizure as the result of an unreasonable *factual* mistake. If he did, he is no more protected [by qualified immunity] from civil liability than are the well-meaning officers who make unreasonable legal mistakes regarding the constitutionality of their conduct.<sup>445</sup>

In *Torres v. City of Madera*,<sup>446</sup> the complaint alleged that the defendant, Officer Marcy Noriega, fatally shot Everardo Torres in the chest with her Glock semiautomatic pistol, “believing it at the time to be her Taser M26 stun gun.”<sup>447</sup> Following *Purnell*, the Ninth Circuit held that Officer Noriega was not entitled to summary judgment either under the Fourth Amendment or on the basis of qualified immunity. The court ruled that where an officer’s use of force is based on a mistake of fact, the pertinent Fourth Amendment question is whether the mistake was objectively reasonable, i.e., “whether a reasonable officer would have or *should* have accurately perceived that fact.”<sup>448</sup> Under the circumstances, a reasonable jury could find that the officer’s

mistake was unreasonable because her own prior incidents of weapon confusion put her on notice of the risk of repetition, her daily practice drawing weapons at her sergeant’s instruction equipped her with the training to avoid such incidents, and the non-exigent circumstances surrounding Everardo’s deadly shooting [i.e., he was sitting handcuffed in back of the patrol car when he was shot] did not warrant such hasty conduct heightening the risk of weapon error.<sup>449</sup>

Therefore, a reasonable jury could find that the use of deadly force was excessive and thus in violation of the Fourth Amendment.

Nor was Noriega entitled to qualified immunity on summary judgment. The Ninth Circuit ruled that while the Fourth Amendment analysis considers the reasonableness of an officer’s mistake of fact, qualified immunity is concerned only with the reason-

ableness of the officer's mistake of law. Officer Noriega was not protected by qualified immunity because it was clearly established that unreasonably mistaken use of deadly force against an unarmed, non-dangerous suspect violated the Fourth Amendment.

c) *Need for Deadly Force Instruction?*

The federal courts generally define "deadly force" for Fourth Amendment purposes as force carrying a "substantial risk of causing death or serious bodily injury."<sup>450</sup> Prior to the Supreme Court's decision in *Harris*, some courts held that when "deadly force" is used, the district court's instructions should not merely articulate the general *Graham* standard of objective reasonableness, but should include the more specific "detailed" and "demanding" *Garner* standard.<sup>451</sup> In deadly force cases, these decisions reasoned, the *Graham* standard does not adequately inform the jury about when a police officer may constitutionally use deadly force.<sup>452</sup> However, the *Harris* decision—that *Garner* was simply an application of the generally applicable Fourth Amendment "objective reasonableness" standard—has created uncertainty as to whether a special instruction on deadly force is required.<sup>453</sup>

d) *Is Summary Judgment Appropriate?*

Whether an officer used excessive force in violation of the Fourth Amendment is normally a factual issue for the jury, and "summary judgment . . . in excessive force cases should be granted sparingly."<sup>454</sup> However, some Fourth Amendment excessive force cases can be decided on summary judgment,<sup>455</sup> especially when qualified immunity is asserted as a defense.<sup>456</sup> Further, as discussed earlier, summary judgment may be appropriate when there is a videotape of the incident that was not doctored or altered, and that accurately depicts the incident.<sup>457</sup>

e) *Duty to Prevent Use of Excessive Force*

An "on-looking" officer who has a realistic opportunity to prevent a fellow officer from inflicting deadly harm has a constitutional obligation to take reasonable steps to do so. The Seventh Circuit stated that "a defendant police officer may be held to account both for his own use of excessive force . . . as well as his failure to take

reasonable steps to attempt to stop the use of excessive force used by his fellow officers.”<sup>458</sup>

*f) Right to Medical Treatment*

Fourth Amendment excessive force claims are often accompanied by due process claims of failure to provide medical treatment. In *City of Revere v. Massachusetts General Hospital*,<sup>459</sup> the Supreme Court held that due process requires the state “to provide medical care to persons . . . who have been injured while being apprehended by the police.”<sup>460</sup> The Court did not articulate a particular due process standard, but stated that “the due process rights of [detainees] are at least as great as the Eighth Amendment protections available to a convicted prisoner.”<sup>461</sup> To prove an Eighth Amendment violation, a convicted prisoner must demonstrate deliberate indifference to a serious medical need.<sup>462</sup> Many circuits apply the Eighth Amendment “deliberate indifference” standard for detainee medical care cases.<sup>463</sup>

**B. Prisoner Excessive Force Claims Under Eighth Amendment**

Unlike excessive force claims brought under the Fourth Amendment, in which the officer’s subjective motive or intent is irrelevant and the constitutionality of the use of force is evaluated under an objective reasonableness standard, malice is the central inquiry under the Eighth Amendment for a prisoner’s claim alleging the use of excessive force by prison guards. The Eighth Amendment standard is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”<sup>464</sup> In two decisions, the Supreme Court held that this standard applies to the use of force by prison officers to control prisoners, whether to diffuse a riot<sup>465</sup> or to impose discipline.<sup>466</sup> A model jury instruction for an Eighth Amendment prisoner excessive force claim is in the Appendix (*see infra* Model Instruction 3).

In *Whitley v. Albers*,<sup>467</sup> the Supreme Court held that five factors are relevant in determining whether officers acted maliciously when they used force to quell a prison riot: (1) the need for force; (2) “the relationship between the need and the amount of force that was used”; (3) “the extent of injury inflicted”; (4) “the extent of the threat to the safety of staff and inmates”; and (5) “any efforts made to temper the severity of a forceful response.”<sup>468</sup> The Court in *Whitley* said that courts should

defer to the judgment of prison officials, who typically have to make decisions regarding the use of force in pressured, tense circumstances.<sup>469</sup>

The Supreme Court later applied the *Whitley* standards in *Hudson v. McMillian*,<sup>470</sup> where officials did not face the exigencies of a prison riot. *Hudson* held that prisoners who assert Eighth Amendment excessive force claims are not required to establish “significant injury.”<sup>471</sup> However, plaintiffs must allege something more than a *de minimis* injury unless the force used was “repugnant to the conscience of mankind.”<sup>472</sup> Thus, the extent of an injury is just one factor in determining whether the official acted with malice.

Relying on *Hudson*, the Supreme Court, in *Wilkins v. Gaddy*,<sup>473</sup> held that a prisoner’s § 1983 Eighth Amendment excessive force claim should not be dismissed solely because the prisoner’s injuries were *de minimis*. The Court acknowledged that the extent of injury may be a relevant indicator of the amount of force used, and of whether “force could plausibly have been thought necessary.”<sup>474</sup> The degree of injury may also be relevant on the issue of damages.<sup>475</sup> “Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”<sup>476</sup>

The district judge must determine whether there is sufficient evidence for a prisoner excessive force claim to be submitted to a jury, or whether it should be decided as a matter of law on summary judgment or a motion to dismiss. In *Whitley*, the Supreme Court stated that “[u]nless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the [Eighth Amendment] standard we have described, the case should not go to the jury.”<sup>477</sup>

#### C. Pretrial Detainee Excessive Force Claims Under Fourteenth Amendment

In *Graham v. Connor*,<sup>478</sup> the Supreme Court, citing *Bell v. Wolfish*,<sup>479</sup> stated that “the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”<sup>480</sup> Later, however, the Court held, in *County of Sacramento v. Lewis*,<sup>481</sup> that to violate the substantive due process component of the Fourteenth Amendment, an official’s actions must “shock the conscience.”<sup>482</sup> Officials commit con-

science-shocking actions when they use force with an intent to harm that is “unrelated to the legitimate object of arrest.”<sup>483</sup> The Court derived this malice standard by likening a police officer’s actions during a high-speed pursuit to a prison guard’s actions during a riot:<sup>484</sup> both must act quickly with little time for reflection. However, the Court in *Lewis* did not state that the “shocks-the-conscience” standard applies specifically to excessive force claims raised by pretrial detainees. It is thus unclear whether the Supreme Court in *Lewis* intended to modify the holding in *Wolfish*.

There is a conflict among the circuits concerning the appropriate due process standard for detainee excessive force claims.<sup>485</sup> For example, the First Circuit applies the *Bell* punishment standard,<sup>486</sup> while the Third, Fourth, Fifth and Eleventh Circuits have adopted a malice standard, i.e., whether the force was applied in a good-faith effort to restore discipline or maliciously and sadistically to cause harm.<sup>487</sup> The Seventh Circuit holds that the *Bell* standard applies to detainee due process challenges to general practices, rules, and restrictions on pretrial confinement, but that detainee challenges to specific acts or failures to act by government officials are governed by the deliberate indifference test.<sup>488</sup> A federal district judge faced with a detainee excessive force claim must apply the controlling circuit decisional law.<sup>489</sup> If such decisional law does not exist, the author recommends application of the *Bell* standard.

Analyzing the substantive due process rights of pretrial detention in detail, the Supreme Court stated in *Bell*:

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law....

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it and whether it appears excessive

in relation to the alternative purpose....” Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.<sup>490</sup>

In the author’s view, the Supreme Court decisions in *Graham* and *Bell* strongly support the application of the due process punishment standard to detainee excessive force claims.<sup>491</sup>

## VI. Arrests and Searches

Section 1983 complaints challenging law enforcement arrests, stops, frisks, searches, and seizures of property require the federal district court to determine the Fourth Amendment limitations on these law-enforcement actions.<sup>492</sup> Given that the Supreme Court has decided more than three hundred Fourth Amendment cases since its decision in *Boyd v. United States*<sup>493</sup>—the first Supreme Court decision seriously considering the Fourth Amendment—comprehensive coverage of this voluminous subject is beyond the scope of this monograph.

### A. Arrests

The critical issue in most § 1983 unconstitutional arrest cases is whether the officer had probable cause to arrest. Probable cause is a complete defense to a § 1983 unconstitutional arrest claim brought under the Fourth Amendment.<sup>494</sup> Probable cause exists when the “facts and circumstances within the officer’s knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”<sup>495</sup> An officer cannot close her eyes to potentially exculpatory evidence, but once she has evidence from a reasonably credible source, she has “no constitutional obligation to conduct any further investigation before making an arrest.”<sup>496</sup> Because probable cause is a wholly objective standard, viewed from the perspective of a “reasonable officer,” the officer’s subjective motivation is irrelevant.<sup>497</sup> A model jury instruction for a Fourth Amendment false arrest claim is in the Appendix (*see infra* Model Instruction 4).



A warrantless arrest in a public place comports with the Fourth Amendment so long as there was probable cause to arrest the suspect for *some* crime—the probable cause need not be for the crime articulated by the arresting officer, or even for a “closely related” crime.<sup>498</sup> Further, an arrest in a public place supported by probable cause comports with the Fourth Amendment even if the arrest violates a state law which authorizes only a citation for the particular offense.<sup>499</sup> In sharp contrast to arrests in public places, an arrest in the arrestee’s home generally requires an arrest warrant and reason to believe the suspect is in the home.<sup>500</sup>

There is a conflict among the circuits as to who bears the burden of proof in a § 1983 claim based on unconstitutional arrest.<sup>501</sup> Some courts hold that the plaintiff has the burden of proving that the arrest violated the Fourth Amendment.<sup>502</sup> The Ninth Circuit, for instance, held that a § 1983 plaintiff “at all times had the ultimate burden of proving to the jury that she had been seized unreasonably in violation of the Fourth Amendment.”<sup>503</sup> In a subsequent decision, the Ninth Circuit explained that

[a]lthough the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant.<sup>504</sup>

The Tenth Circuit ruled that when a § 1983 plaintiff alleges arrest without probable cause, the defendant has the burden of proving probable cause.<sup>505</sup> The position finds support in the common-law principle that probable cause is a defense to a false arrest claim—a principle that has been held to apply to § 1983 unconstitutional arrest claims.<sup>506</sup>

## B. Stop and Frisk

Many § 1983 actions contest police stops and frisks.<sup>507</sup> In the Supreme Court’s landmark decision in *Terry v. Ohio*,<sup>508</sup> the Court held that a stop is a “seizure” and a frisk is a “search” within the meaning of the Fourth Amendment. However, because a “stop” is a lesser intrusion than an arrest, and a “frisk” is not a full-blown search, a “stop and frisk”

is governed by a lesser standard than probable cause, namely reasonable suspicion. The Court in *Terry* said that the police officer must “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.”<sup>509</sup> There must be reasonable suspicion to justify both the stop *and* the frisk. To justify a stop, the officer “must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.”<sup>510</sup>

When a person is lawfully stopped, the officer may frisk him if the officer has a particularized and objective basis for concluding that the suspect is armed and dangerous.<sup>511</sup> Like probable cause, reasonable suspicion is an objective, “reasonable person” test under which the officer’s subjective belief is irrelevant.<sup>512</sup> Leading Supreme Court decisions applying the reasonable suspicion standard are cited here.<sup>513</sup>

### C. Searches

Large numbers of § 1983 actions allege that law enforcement officers conducted a “search” in violation of the Fourth Amendment. The alleged search may have occurred in conjunction with an arrest of the plaintiff, or independent of any arrest.<sup>514</sup> Supreme Court decisional law governing searches is complex and extensive.<sup>515</sup> Leading Supreme Court cases for particular Fourth Amendment search issues especially likely to be relevant in § 1983 litigations are cited in the endnote.<sup>516</sup>

The cases are in conflict concerning the burden in § 1983 actions challenging warrantless searches.<sup>517</sup> Courts of appeals decisions consistently state that probable cause normally presents a question of fact for the jury “unless there is only one reasonable determination possible.”<sup>518</sup> Therefore, “a district court may conclude ‘that probable cause did exist as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding,’ and may enter summary judgment accordingly.”<sup>519</sup> It seems that federal courts are able to resolve a large percentage of probable cause issues as a matter of law. Further, Fourth Amendment challenges to arrests and searches are subject to qualified immunity.<sup>520</sup>

### D. Separate Analysis of Different Aspects of Officer’s Conduct (*Muehler v. Mena*)

In many § 1983 Fourth Amendment cases it is necessary to analyze the different components of the law enforcement officer’s actions separate-

ly. The Supreme Court's decision in *Muehler v. Mena*<sup>521</sup> provides a valuable illustration. In that case, the plaintiff, an occupant of the premises being searched, was detained, handcuffed, and questioned while the officers executed the search warrant; the Court analyzed each of these actions separately and found no violation of the Fourth Amendment.<sup>522</sup> On the detention issue, the Court held that its decision in *Michigan v. Summers*<sup>523</sup> established that police officers who execute a search warrant may detain any individuals on the premises.<sup>524</sup> An officer's authority to detain incident to a search supported by probable cause is "implicit"; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure."<sup>525</sup> On the handcuffing claim, *Muehler* held that, under the particular circumstances, the plaintiff's "detention in handcuffs for the length of the search was consistent with . . . *Summers*."<sup>526</sup> The handcuffing was reasonable because "this was no ordinary search" but "a search for weapons and a wanted gang member reside[d] on the premises."<sup>527</sup> Justice Kennedy, concurring, pointed out that excessively tight or prolonged handcuffing may give rise to a § 1983 Fourth Amendment excessive force claim.<sup>528</sup> Finally, the Court held that police questioning of a person detained during the execution of a search warrant does not require independent probable cause because "mere police questioning does not constitute a seizure."<sup>529</sup>

## VII. Malicious Prosecution Claims Under Fourth Amendment

The federal courts have had difficulty determining whether a § 1983 complaint states a proper constitutional claim for "malicious prosecution." Prior to the Supreme Court's 1994 decision in *Albright v. Oliver*,<sup>530</sup> some lower courts used the common-law elements of a malicious prosecution tort to establish a substantive due process malicious prosecution claim. These elements are (1) institution of a criminal prosecution; (2) without probable cause; (3) with malice; and (4) termination in favor of the accused.<sup>531</sup> It is now established, however, that state law malicious prosecution claims do not constitute constitutional claims simply because they are "garbed in the regalia of § 1983."<sup>532</sup>

In *Albright* the justices wrote six separate opinions reflecting a variety of views about whether a claim that a criminal prosecution was undertaken without probable cause could be premised on substantive due process.

Because there was no majority opinion, it is difficult to determine what the Court resolved.

The plurality opinion, written by Chief Justice Rehnquist (joined by Justices O'Connor, Scalia, and Ginsburg), found that an individual who has been arrested cannot premise a claim that he was prosecuted without probable cause upon substantive due process, but *may* be able to premise such a claim on the Fourth Amendment. However, because the plaintiff did not present a Fourth Amendment claim, the Court did not decide whether he actually had a valid Fourth Amendment claim. In fact, the Court has “never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983.”<sup>533</sup> Arguably the concurrences of Justices Kennedy (joined by Justice Thomas) and Souter can be read as agreeing with the plurality’s rejection of substantive due process as the basis for the claim, and as leaving open the possibility of the claim being premised on the Fourth Amendment.<sup>534</sup>

It is worthwhile to highlight some of the other positions of the justices in *Albright*. Justice Ginsburg, in her concurring opinion, found that the Fourth Amendment did apply to the facts of Albright’s case because the restraint imposed on a person arrested on a criminal charge does not end upon release from official custody and continues throughout the criminal trial.<sup>535</sup> For example, he must appear in court when ordered to do so, and may need permission to travel beyond the court’s jurisdiction. The arrestee is thus subject to a “continuing seizure” throughout the criminal proceeding that requires ongoing compliance with the Fourth Amendment. She found, however, that Albright abandoned his Fourth Amendment claim.

Justice Kennedy, joined by Justice Thomas, concurred in the judgment, asserting that a malicious prosecution claim is actually a procedural due process claim.<sup>536</sup> He acknowledged that the Due Process Clause protects more than the liberty interests specified in the Bill of Rights. However, “the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution.”<sup>537</sup> Kennedy stated that, in some circumstances, the challenged governmental actions alleging “malicious prosecution” may state a violation of procedural due process, but found such a claim was not viable in this case because state law provided the plaintiff with a remedy.<sup>538</sup>

Justice Souter, concurring, rejected the substantive due process claim for two reasons. First, he opined that a substantive due process claim is

available only when the textually explicit provisions of the Bill of Rights do not apply, and the plaintiff's substantive due process claim is "substantial."<sup>539</sup> Second, the types of injuries alleged were compensable under the Fourth Amendment, yet the plaintiff, Albright, had not relied on it.<sup>540</sup> Souter recognized that sometimes injuries may occur before there is a Fourth Amendment seizure; whether these injuries are actionable under substantive due process, he stated, was not presented by the facts of this case.<sup>541</sup>

In his dissent, Justice Stevens, joined by Justice Blackmun, concluded that the plaintiff stated a violation of substantive due process.<sup>542</sup>

Given the variety of views articulated by the justices, it is not surprising that *Albright* "spawned controversy and confusion in the lower courts."<sup>543</sup> The courts of appeals disagree, *inter alia*, over whether there are circumstances in which an alleged malicious prosecution may violate the Fourth Amendment.<sup>544</sup> Some decisions hold that a § 1983 claim may be premised upon an unreasonable seizure under the Fourth Amendment combined with the common-law elements of malicious prosecution, raising questions of, *inter alia*, probable cause to prosecute, malice, and favorable termination,<sup>545</sup> while other circuits have taken a purely Fourth Amendment approach.<sup>546</sup> The Third Circuit held, 2–1, that the § 1983 claim may lie when some, though not all, criminal charges are terminated in favor of the criminal defendant.<sup>547</sup> Illustrative courts of appeals decisions are cited in the note, below.<sup>548</sup>

Clearly, referring to the § 1983 claim as a "malicious prosecution" claim clouds rather than clarifies the analysis because, when all is said and done, the plaintiff must establish a violation of a specific, constitutionally protected right.<sup>549</sup>

### VIII. Conditions-of-Confinement Claims Under Eighth Amendment

When challenging their conditions of confinement, prisoners must prove that the conditions constituted "cruel and unusual punishment" within the meaning of the Eighth Amendment. The Eighth Amendment does not require comfortable prisons, but forbids inhumane conditions.<sup>550</sup> The Supreme Court has defined the Eighth Amendment standard as containing both subjective and objective components.<sup>551</sup> The subjective component requires proof that prison officials acted with subjective deliberate indifference,<sup>552</sup> while the objective component requires proof that the depri-

vation was “sufficiently serious.”<sup>553</sup> Several Supreme Court decisions shed light on the meaning of these two components.

In *Estelle v. Gamble*,<sup>554</sup> a case involving medical care of prisoners, the Supreme Court held that to state a claim for medical treatment under the Eighth Amendment, a prisoner must prove that prison officials were deliberately indifferent to the prisoner’s “serious medical needs.”<sup>555</sup> The Court determined that the Eighth Amendment was not violated by negligent medical care. Thus, medical malpractice is not a constitutional violation simply because the plaintiff is a prisoner.<sup>556</sup>

In an important decision, *Cotts v. Osafo*,<sup>557</sup> the Seventh Circuit held that, because prison medical treatment claims require the plaintiff to prove deliberate indifference to a serious medical need, the jury instructions should not require him to prove “cruel and unusual punishment.”<sup>558</sup> The court reasoned that “cruel and unusual punishment language” in the instructions may mislead the jury into concluding that the plaintiff has to prove “that the defendants affirmatively ‘punished’ him.”<sup>559</sup> The court in *Cotts* also ruled that the jury instructions on a prisoner medical treatment claim should not require the plaintiff to prove damages at the liability stage because “[d]amages are not an element of liability in a deliberate indifference claim.”<sup>560</sup>

In *Wilson v. Seiter*,<sup>561</sup> the Supreme Court interpreted *Estelle* to govern all claims challenging prison conditions.<sup>562</sup> *Wilson* narrowly defined both the subjective and objective components, holding that the subjective deliberate indifference component is a necessary element of all prison condition claims.<sup>563</sup> Inhumane prison conditions alone do not constitute an Eighth Amendment violation.<sup>564</sup> The Court also held that the objective component requires proof that the deprivation was “serious,” that is, one addressing a specific, basic human need like “food, warmth, or exercise.”<sup>565</sup> “Nothing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.”<sup>566</sup> The Court left open whether inadequate funding was a defense to a finding of subjective deliberate indifference.<sup>567</sup> The concurrence in *Wilson*, however, noted that the courts of appeals have rejected such a “cost” defense.<sup>568</sup>

Subsequently, the Supreme Court held, in *Helling v. McKinney*,<sup>569</sup> that a prisoner stated an Eighth Amendment claim in challenging his confinement with a cell mate who smoked five packs of cigarettes a day.<sup>570</sup> The

Court found that this case was similar to *Estelle* because the challenge concerned a prisoner's health. Further, it explained, the Eighth Amendment applies equally to claims that prison conditions are causing current physical harm, and claims that prison conditions may cause future harm.<sup>571</sup>

In *Farmer v. Brennan*,<sup>572</sup> the Court defined the term "deliberate indifference."<sup>573</sup> Recognizing an Eighth Amendment duty on the part of prison officials to protect prisoners from harming each other, the Court explained that the "deliberate indifference" standard in this context is subjective, not objective. Deliberate indifference requires proof that the official actually knew of a substantial risk of serious harm and failed to act.<sup>574</sup> The Court flatly rejected objective deliberate indifference—a showing that officials knew or should have known of the harm, regardless of their actual state of mind—as the correct standard in "inhumane conditions of confinement" cases.<sup>575</sup> Because deliberate indifference "describes a state of mind more blameworthy than negligence,"<sup>576</sup> the Court adopted the subjective definition of deliberate indifference. This subjective standard protects the prison officials who either were not aware of the facts giving rise to the risk of harm, or who failed to deduce the risk of serious harm.<sup>577</sup> The jury, however, can infer that the official actually knew of the risk based on the same type of circumstantial evidence that is used to prove objective deliberate indifference, i.e., a risk of harm sufficiently apparent that the officer should have known of it.<sup>578</sup> The Court said that this issue of fact can be demonstrated "in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."<sup>579</sup>

The subjective and objective components analyzed in conditions-of-confinement claims under the Eighth Amendment are also part of the Court's analysis of prisoner excessive force claims under the Eighth Amendment.<sup>580</sup>

The Supreme Court has thus recognized two different subjective components under the Eighth Amendment—deliberate indifference and malice.<sup>581</sup> The Court derived these different states of mind by balancing a prisoner's interest in bodily integrity against the need for institutional order.<sup>582</sup> Malice is the proper standard in prisoner excessive force cases, because in the prison discipline or riot contexts exigencies exist. However, in general prison condition litigation, where prison officials do not encounter these difficult circumstances, deliberate indifference is the proper standard.<sup>583</sup>

## IX. First Amendment Claims

Two frequently raised § 1983 claims by government employees involve the First Amendment right to free speech. The first type of claim contests adverse employment decisions allegedly based on an employee's affiliations with political parties. The second type contests an adverse employment decision allegedly based on an employee's speech.

### A. Public Employee Political Affiliation Claims

A plurality of the Supreme Court first held, in *Elrod v. Burns*,<sup>584</sup> that dismissals of public employees because of their political affiliations generally violate the First Amendment and must be limited to “policy-making positions.” Four years later, however, the Court, in *Branti v. Finkel*,<sup>585</sup> modified the *Elrod* rule, stating that “the ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position,” but whether the hiring authority can demonstrate that party affiliation is “an appropriate requirement for the effective performance of the public office involved.”<sup>586</sup> The *Branti* Court indicated that the plaintiff makes out a prima facie case by showing that she was discharged because of her political affiliation.<sup>587</sup> In *Rutan v. Republican Party of Illinois*,<sup>588</sup> the Supreme Court held that the First Amendment prohibits political patronage as the sole basis for decisions concerning “promotions, transfers, and recalls after layoffs.”<sup>589</sup> It explained that the government’s right to take action against deficient performance effectively protects the government’s interests when addressing the employment of staff members. However, when evaluating high-level employees, the government may consider “who will loyally implement its policies.”<sup>590</sup> Although the Court recognized two classes of employees—staff members and high-level employees—it nevertheless explained that performance is the central issue, with political affiliation being a permissible factor with respect only to the higher-level employees. The lower federal courts frequently experience difficulties in determining whether political affiliation is an “appropriate” consideration for particular public employment positions.<sup>591</sup>

A defendant who is sued on a public employment, political affiliation claim can prevail under *Mt. Healthy*’s<sup>592</sup> dual motive doctrine, by demonstrating that even conceding that he considered the plaintiff’s political affiliation, he would have taken the same adverse action



anyway for permissible reasons. As the First Circuit put it, “even if a plaintiff shows an impermissible political motive, he cannot win if the employer shows that it would have taken the same action anyway, say, as part of a bona fide reorganization.”<sup>593</sup>

Courts have properly stressed that public employee claims that employment decisions were made on the basis of political affiliation must be distinguished from claims that employment decisions were motivated by “cronyism” and the like.<sup>594</sup> “‘Back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, [and] spite’ are not illegal motivations for employment decisions.”<sup>595</sup> There is thus an important First Amendment

distinction between a public official who chooses to hire friends, relatives, neighbors or college buddies, and one who refuses to hire those who failed to make campaign contributions, join her political party or attend political rallies. Although the first public official may be practicing bad policy, she is not practicing political affiliation discrimination that violates First Amendment rights.<sup>596</sup>

The Court, in *O’Hare Truck Service, Inc. v. City of Northlake*,<sup>597</sup> held that government contractors have First Amendment protection against adverse action because of their political affiliation. *O’Hare* rejected drawing a distinction between independent contractors and public employees, because contractors are not less dependent on income than are employees.<sup>598</sup>

## B. Public Employee Free-Speech Retaliation Claims

When a public employee claims that her employer made an adverse employment decision because of the employee’s speech, three legal issues are central: (1) whether the speech was pursuant to the employee’s official duties;<sup>599</sup> (2) whether the speech was a “matter of public concern”; and, if the speech was not pursuant to official duties and was a matter of public concern;<sup>600</sup> (3) whether the employee’s speech interest outweighs the government’s interest in effective governmental operations.<sup>601</sup>

A public employee’s speech is protected by the Free Speech Clause only if it is of public concern.<sup>602</sup> In determining what constitutes a matter of public concern, courts should consider “the content, form and context” of the statement.<sup>603</sup> An employee’s mere personal grievance is not a matter of public concern; the speech must have broader social or

political interest.<sup>604</sup> The employee must speak on “matters in which the public might be interested as distinct from wholly personal grievances.”<sup>605</sup> Most courts hold that the employee’s motive is relevant, though not necessarily dispositive, in determining whether her speech was of public concern.<sup>606</sup> Whether the speech was a matter of public concern is an issue of law for the court.<sup>607</sup>

Employers need not determine what the employee actually said;<sup>608</sup> they must only reasonably investigate the nature of the employee’s speech.<sup>609</sup> If there was a substantial likelihood that the employee engaged in protected speech, a supervisor must investigate before making an adverse employment decision regarding the employee.<sup>610</sup> Only procedures outside the range of what a reasonable supervisor would use will be found unreasonable. The reasonableness standard is objective; the subjective good faith of the employer is not controlling.<sup>611</sup>

Under the Supreme Court’s decision in *Garcetti v. Ceballos*,<sup>612</sup> speech on a matter of public concern will nevertheless be unprotected under the First Amendment if it was pursuant to the employee’s official responsibilities.<sup>613</sup> The employee’s official job description may not be dispositive of whether the employee’s speech was pursuant to her official duties. The Court stated that the

proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee is actually expected to perform and the listing of a given task in an employee’s job description is neither necessary nor sufficient to demonstrate that conducting the task is within the employee’s professional duties for First Amendment purposes.<sup>614</sup>

In *Lane v. Franks*,<sup>615</sup> the § 1983 plaintiff, a public employee, claimed that he was fired in violation of the First Amendment for giving truthful testimony pursuant to subpoena in a criminal case. The Supreme Court held that a public employee’s truthful testimony on a matter of public concern, given pursuant to subpoena and outside of his ordinary job responsibilities, is protected First Amendment speech. The Court reasoned that anyone who testifies in court is obligated to give truthful testimony, and that this obligation is distinct and independent from the employee’s employment obligations. “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when

the testimony relates to his public employment or concerns information learned during that employment.”<sup>616</sup> The Court thus clarified that “[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>617</sup> Justice Thomas’s concurring opinion stressed that the Court in *Lane* did not address whether public employees, such as police officers, crime scene technicians, and laboratory analysts, who testify as a routine part of their job responsibilities, are engaged in protected First Amendment activity.

The lower federal courts have disagreed over whether the “pursuant to official duties” issue is an issue of law for the court,<sup>618</sup> an issue of fact for the jury,<sup>619</sup> or a mixed question of law and fact.<sup>620</sup> In the author’s view, when the scope of the employee’s duties is clearly defined in a written policy, whether the employee’s speech was pursuant to her official duties will normally be an issue of law for the court. On the other hand, when an issue is raised whether the employee’s duties in practice differ from the written policy, the scope of the employee’s authority will likely present an issue of fact. The *Garcetti* issue of whether employee speech was pursuant to official duties has generated a tremendous amount of lower court decisional law.<sup>621</sup>

Under the balancing test established in *Pickering v. Board of Education*,<sup>622</sup> even if an employee’s speech was of public concern and not pursuant to her official duties, the employee’s speech will not be protected if the employee’s speech interests are outweighed by the government’s interest in efficient operations. Government interests are likely to prevail when the employment relationship requires confidentiality or personal loyalty, or when the speech threatens the maintenance of employment discipline or harmony.<sup>623</sup> In evaluating the disruptive impact of the employee’s speech, courts are to show “a wide degree of deference to the employer’s judgment” when “a close working relationship [is] essential to fulfilling public responsibilities.”<sup>624</sup> If, however, an employee does not have a “confidential, policymaking, or public contact role,” the level of disruptiveness would probably be “minimal.”<sup>625</sup> *Pickering* balancing is an issue of law for the court.<sup>626</sup> Because *Pickering* balancing entails an intense ad hoc evaluation based on the facts of the particular case, courts often find that the law was not clearly established, and the defendant thus protected by qualified immunity.<sup>627</sup>

Of course, if the plaintiff succeeds on the issues of public concern, official duties, and *Pickering* balancing, the factual issue whether the employee's speech was a motivating factor in the adverse employment decision still needs to be resolved.<sup>628</sup>

### C. Prisoner Retaliation Claims

Prisoners frequently allege that prison officials retaliated against them for engaging in constitutionally protected activity, such as the filing of a judicial proceeding or prison grievance.<sup>629</sup> To establish a First Amendment retaliation claim, the prisoner must show that (1) he engaged in constitutionally protected speech or conduct, (2) the defendant took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action.<sup>630</sup> The adverse action must be "sufficient to deter a person of ordinary firmness" from exercising his constitutional rights.<sup>631</sup> The causal connection requires the plaintiff to prove that his protected First Amendment activity was a "motivating factor" for the retaliatory adverse action.<sup>632</sup> The inmate need not prove that his speech was a matter of public concern.<sup>633</sup> An inmate alleging a First Amendment retaliation claim need not prove that he had an independent liberty interest in the privilege he was denied.<sup>634</sup>

Federal courts approach prisoner First Amendment retaliation claims "with skepticism and particular care" because "virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act."<sup>635</sup> In other words, prisoner retaliation claims are "prone to abuse since prisoners can claim retaliation for every decision they dislike."<sup>636</sup> On the other hand, the prisoner is not necessarily required to produce direct evidence to establish retaliatory motive.<sup>637</sup> "[C]ircumstantial evidence may be . . . sufficient to raise a genuine issue of material fact [regarding the prison official's retaliatory motives] precluding the grant of summary judgment."<sup>638</sup>

### D. Retaliatory Prosecution and Retaliatory Arrest

In *Hartman v. Moore*,<sup>639</sup> the Supreme Court held that a plaintiff who asserts a First Amendment claim of retaliatory prosecution against a law enforcement officer must plead and demonstrate an absence of prob-

able cause. The Court reasoned that when there is probable cause for the prosecution, the causal relationship between the law enforcement officer's conduct and the prosecutor's decision to prosecute is too uncertain to allow the claim for relief against the law enforcement officer to proceed. The claim against the prosecutor based on her decision to prosecute would be barred by absolute prosecutorial immunity.<sup>640</sup>

It is unclear whether *Hartman* extends to a First Amendment claim of retaliatory arrest. Some circuits applied *Hartman* to a retaliatory arrest claim and held that the plaintiff must establish an absence of probable cause.<sup>641</sup> The Tenth Circuit, however, distinguished *Hartman* and held that a First Amendment retaliatory arrest claim may be asserted even when the arrest is supported by probable cause.<sup>642</sup>

In *Reichle v. Howards*,<sup>643</sup> the Supreme Court held that given the uncertainty in the law of First Amendment retaliatory arrest claims, the defendants/officers were protected by qualified immunity. The Court acknowledged that *Hartman's* rationale for retaliatory prosecution claims does not fully apply to retaliatory arrest claims because, while the former necessarily involve the animus of one official, the law enforcement officer, and the injurious action of the other, the prosecutor, "in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest."<sup>644</sup> On the other hand, like retaliatory prosecution claims,

retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury. An officer might bear animus toward the content of a suspect's speech. But the officer may decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat.<sup>645</sup>

The Supreme Court, however, did not resolve whether *Hartman* applied to a retaliatory arrest claim, holding that only because the law on the issue was not clearly established were the defending officers protected by qualified immunity.<sup>646</sup>

## **X. Equal Protection "Class-of-One" Claims**

The federal district courts are faced with a steady stream of so-called "class-of-one" equal protection claims filed under § 1983. In *Village of Willowbrook v. Olech*,<sup>647</sup> the Supreme Court recognized a "class-of-one" claim under the Equal Protection Clause. The plaintiff stated a proper § 1983

claim based on her allegations that the Village “intentionally treated [her] differently from others similarly situated and there was [no] rational basis for the difference in treatment.”<sup>648</sup> The Court ruled that these allegations stated an equal protection claim “quite apart from the Village’s subjective motivation . . . .”<sup>649</sup>

In *Engquist v. Oregon Department of Agriculture*,<sup>650</sup> the Court held that public employees are categorically barred from asserting class-of-one equal protection claims, no matter how arbitrarily an employee may have been singled out for disadvantageous treatment. Government employers typically have great discretion in dealing with their employees, and this discretion would be undermined if employees were permitted to assert “class-of-one” claims.<sup>651</sup> The Court said that its decision rejecting public employee “class-of-one” equal protection claims comported with the principle “that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.”<sup>652</sup>

The federal courts have been struggling to determine the contours of the class-of-one doctrine in order to prevent every mistake by a government officer and “every claim for improper provision of municipal services or for improper conduct of an investigation” from being turned into a § 1983 constitutional suit.<sup>653</sup> The law in this area is in a state of flux, and it is important that the district court apply the most recent decisional law of the governing circuit.<sup>654</sup>

## 6. Enforcement of Federal Statutes Under § 1983

Some federal statutory rights may be enforced under § 1983. In *Maine v. Thiboutot*,<sup>655</sup> the Supreme Court rejected the argument that only federal statutes dealing with “equal rights” or “civil rights” are enforceable under § 1983. It held that § 1983’s reference to “laws” of the United States means what it says, and, therefore, that all federal statutes are enforceable under § 1983 against defendants who acted under color of state law. However, as discussed below, subsequent Supreme Court decisions substantially cut back the decision in *Thiboutot* by holding that not all federal statutes are enforceable under § 1983.<sup>656</sup> These decisions hold that a federal statute is not enforceable under § 1983 if it either (1) does not unambiguously create a federal right in the plaintiffs, or (2) contains enforcement remedies intended by Congress to be the exclusive means of enforcement.

### I. Enforcement of Federal “Rights”

For a federal statute to be enforceable under § 1983, “a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.”<sup>657</sup> The Supreme Court has identified three factors to determine whether a particular federal statutory provision creates an enforceable federal right in favor of the plaintiff:

First, Congress must have intended that the provision in question benefit the plaintiff.<sup>658</sup>

Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.<sup>659</sup>

Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.<sup>660</sup>

The pertinent issue is not whether the federal statutory *scheme* creates enforceable rights, but whether the *specific* federal statutory provision at issue creates enforceable rights.<sup>661</sup>

In *Pennhurst State School & Hospital v. Halderman*,<sup>662</sup> the Supreme Court held that 42 U.S.C. § 6009, the “bill of rights” provision of the De-

velopmental Disabilities Assistance and Bill of Rights Act, did not create enforceable rights in favor of the developmentally disabled.<sup>663</sup> The Court identified the inquiry as whether the statutory provisions at issue “imposed an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms.”<sup>664</sup> Applying the principle that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously,”<sup>665</sup> the Court found that “the provisions of § [6009] were intended to be hortatory, not mandatory.”<sup>666</sup> “Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled.”<sup>667</sup> Therefore, the Court held that § 6009 did not create substantive rights in favor of the mentally disabled to “appropriate treatment” in the “least restrictive” environment, and thus was not enforceable through § 1983.<sup>668</sup>

In its next several decisions concerning the enforcement of federal statutes under § 1983, the Supreme Court found that federal statutes created enforceable rights. In *Golden State Transit Corp. v. City of Los Angeles*,<sup>669</sup> the Court held that Golden State could sue for damages under § 1983 to remedy the violation of its right against unfair labor practices under the National Labor Relations Act<sup>670</sup> not to have the renewal of its taxi license conditioned on the settlement of a pending labor dispute.<sup>671</sup> The Court found that the federal statute created enforceable rights in the plaintiff and did not contain a comprehensive enforcement scheme precluding enforcement under § 1983.<sup>672</sup>

In *Wright v. City of Roanoke Redevelopment & Housing Authority*,<sup>673</sup> the defendant was a public housing authority subject to the Brooke Amendment’s “ceiling for rents charged to low-income people living in public housing projects.”<sup>674</sup> The Department of Housing and Urban Development in its implementing regulations, had “consistently considered ‘rent’ to include a reasonable amount for the use of utilities.”<sup>675</sup> Public housing tenants brought suit under § 1983 alleging that the Roanoke Housing Authority had “imposed a surcharge for ‘excess’ utility consumption that should have been part of [the plaintiffs’] rent and deprived them of their statutory rights to pay only the prescribed maximum portion of their income as rent.”<sup>676</sup> The Supreme Court determined that the Brooke Amendment to the U.S. Housing Act and implementing HUD regulations gave



low-income tenants specific and definable rights to a reasonable utility allowance that were enforceable under § 1983.<sup>677</sup>

*Wilder v. Virginia Hospital Ass'n*<sup>678</sup> involved the Boren Amendment to the Medicaid Act,<sup>679</sup> which required a participating state to reimburse health care providers at “reasonable rates.”<sup>680</sup> The Court concluded that health care providers were clearly intended beneficiaries of the Boren Amendment;<sup>681</sup> that the amendment was cast in mandatory terms, imposing a “binding obligation” on participating states to adopt reasonable reimbursement rates for health care providers; and that this obligation was enforceable under § 1983.<sup>682</sup> The Court rejected the defendant’s argument that the obligation imposed by the Boren Amendment was “too vague and amorphous” to be capable of judicial enforcement.<sup>683</sup> The Court relied upon the facts that “the statute and the Secretary’s regulations set out factors which a State must consider in adopting its rates,” including “the objective benchmark of an ‘efficiently and economically operated facility’ providing care in compliance with federal and state standards while at the same time ensuring ‘reasonable access’ to eligible participants.”<sup>684</sup>

The decisions in *Golden State*, *Wright*, and *Wilder* represent a broad approach to enforcement of federal statutes under § 1983. The Supreme Court’s more recent decisions, however, have generally been more restrictive. In *Suter v. Artist M.*,<sup>685</sup> the Court held that a provision of the Adoption Assistance and Child Welfare Act of 1980 was not enforceable under § 1983.<sup>686</sup> The Act provides for federal reimbursement of certain expenses incurred by a state in administering foster care and adoption services, conditioned upon the state’s submission of a plan for approval by the Secretary of Health and Human Services.<sup>687</sup> To be approved, the plan must satisfy certain requirements, including one that mandates that the state make “reasonable efforts” to keep children in their homes.<sup>688</sup>

The issue in *Suter* was whether “the Adoption Act, unambiguously confer[ed] upon the child beneficiaries of the Act a right to enforce the requirement that the State make ‘reasonable efforts’ to prevent a child from being removed from his home, and once removed to reunify the child with his family.”<sup>689</sup> The Court held that it did not. It concluded that the only unambiguous requirement imposed by 42 U.S.C. § 671(a) was that the state submit a plan to be approved by the Secretary.<sup>690</sup> The Court emphasized that in *Wilder* it had “relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining

the methods for calculating rates,”<sup>691</sup> whereas the Child Welfare Act contained “[n]o further statutory guidance . . . as to how ‘reasonable efforts’ are to be measured.”<sup>692</sup>

In *Blessing v. Freestone*,<sup>693</sup> a unanimous Supreme Court rejected an attempt by custodial parents to enforce, through a § 1983 action, a general, undifferentiated right to “substantial compliance” by state officials with a federally funded child-support enforcement program that operates under Title IV-D of the Social Security Act.<sup>694</sup> While the Court did not foreclose the possibility that certain specific provisions of Title IV-D might give rise to private, enforceable rights, it faulted the court of appeals for taking a “blanket approach,” and for painting “with too broad a brush” in determining whether Title IV-D creates enforceable rights.<sup>695</sup> The Court remanded the case, and instructed the plaintiffs to articulate with particularity the rights they were seeking to enforce. *Blessing* forces plaintiffs to break down their claims into “manageable analytic bites” so that the court can “ascertain whether each separate claim satisfies the various criteria [the Supreme Court has] set forth for determining whether a federal statute creates rights.”<sup>696</sup>

In *Gonzaga University v. Doe*,<sup>697</sup> the Supreme Court held unenforceable under § 1983 a provision of the Family Educational Rights and Privacy Act (FERPA) directing that federal funds shall not be made available to an educational institution that “has a policy of permitting the release of educational records . . . of students without the written consent of their parents.”<sup>698</sup> The Court acknowledged that its decisions governing enforcement of federal statutes under § 1983 contained inconsistent language and created “confusion” in the lower courts.<sup>699</sup> It found that the FERPA provision was not enforceable under § 1983 because it failed to create “in clear and unambiguous terms” a federal right in the plaintiffs.<sup>700</sup> Rather FERPA’s aggregate approach is directed at the U.S. Secretary of Education to deny federal funds to educational institutions that disclose students’ records.<sup>701</sup>

## **II. Specific Comprehensive Scheme Demonstrating Congressional Intent to Foreclose §1983 Remedy**

If the plaintiff demonstrates that a federal statute creates an enforceable right, there is “a rebuttable presumption that the right is enforceable under § 1983.”<sup>702</sup> The defendant has the burden of rebutting the presumption by showing that Congress intended to preclude enforcement under § 1983.<sup>703</sup>

Congress may preclude enforcement under § 1983 either expressly or impliedly by creating a remedial scheme that is so comprehensive as to demonstrate a congressional intent to preclude enforcement under § 1983.<sup>704</sup>

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,<sup>705</sup> an association claimed that the County Sewerage Authority discharged and dumped pollutants, violating the Federal Water Pollution Control Act<sup>706</sup> and the Marine Protection, Research, and Sanctuaries Act of 1972.<sup>707</sup> In addition, the County Sewerage Authority allegedly violated the terms of its permits.<sup>708</sup> Although the issue before the Court was “whether [the Association] may raise either of these claims in a private suit for injunctive and monetary relief, where such a suit is not expressly authorized by either of these Acts,”<sup>709</sup> the Court addressed, *sua sponte*, the enforceability of these Acts pursuant to § 1983. Noting that both statutes contained “unusually elaborate enforcement provisions,”<sup>710</sup> the Court held that “[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”<sup>711</sup>

Similarly, in *Smith v. Robinson*,<sup>712</sup> the Supreme Court concluded that the “carefully tailored administrative and judicial mechanism”<sup>713</sup> embodied in the Education of the Handicapped Act (EHA)<sup>714</sup> reflected Congressional intent that the EHA be “the exclusive avenue through which a plaintiff may assert [an equal protection claim to a publicly financed special education].”<sup>715</sup> The dissent disagreed:

The natural resolution of the conflict between the EHA, on the one hand, and . . . [section] 1983, on the other, is to require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under . . . [section] 1983.<sup>716</sup>

The dissent’s position became the law when, in response to *Smith*, Congress amended the EHA to provide explicitly that parallel constitutional claims were not preempted by the EHA and could be raised in conjunction with claims based on it.<sup>717</sup>

In *City of Rancho Palos Verdes v. Abrams*,<sup>718</sup> the Supreme Court held that specific provisions of the federal Telecommunications Act (TCA) were not enforceable under § 1983 because the TCA has its own, carefully circumscribed remedy. The remedy included a short, thirty-day limitations period; the requirement that a court hear and decide a TCA claim “on an

expedited basis”; and limited remedies, “perhaps” not including compensatory damages and not authorizing awards of attorneys’ fees and costs.<sup>719</sup> The Court found that this highly specific remedy indicated a congressional intent to foreclose rather than supplement the § 1983 remedy for a TCA violation.

### III. Current Supreme Court Approach

The foregoing analysis shows a clear trend in Supreme Court decisions of substantially tightening the standards for enforcing federal statutes under § 1983.<sup>720</sup> In the author’s view, *Gonzaga University v. Doe*<sup>721</sup> is the most significant of these decisions. The Court in *Gonzaga* instructed the lower courts that to find that Congress intended to create an enforceable federal statutory right, Congress “must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights under an implied private right of action.”<sup>722</sup> The Court also strongly indicated that federal statutes enacted under the Spending Clause are unlikely to create private enforceable rights.<sup>723</sup> The Court stated that since its decision in *Pennhurst State School & Hospital v. Halderman*,<sup>724</sup> only twice has it found Spending Clause legislation to give rise to enforceable rights under § 1983.<sup>725</sup> Nevertheless, although Spending Clause legislation has important federalism implications, “it does not follow that Spending Clause legislation can never create judicially enforceable individual rights.”<sup>726</sup>

### IV. Enforcement of Federal Regulations Under § 1983

There is some uncertainty as to when a federal regulation is enforceable under § 1983.<sup>727</sup> Most Circuit decisions on the issue hold that “a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.”<sup>728</sup> Under this view, “regulations give rise to a right of action [under § 1983] only insofar as they construe a personal right that a statute creates.”<sup>729</sup> This position finds support in *Alexander v. Sandoval*,<sup>730</sup> where the Supreme Court stated that “language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”<sup>731</sup> Although the Supreme Court found a federal regulation enforceable under § 1983 in *Wright v. City of Roanoke Redevelopment & Housing Authority*,<sup>732</sup> the regulation was promulgated pursuant to a federal statute that itself created rights enforceable under § 1983.

## 7. Color of State Law and State Action

An essential ingredient of a § 1983 claim is that the defendant acted under color of state law.<sup>733</sup> Furthermore, the Fourteenth Amendment imposes limitations only on state action; it does not reach the conduct of private parties, no matter how discriminatory or harmful.<sup>734</sup> Neither § 1983 nor the Fourteenth Amendment reaches the conduct of federal officials<sup>735</sup> or of purely private persons. “[P]ersons victimized by the tortious conduct of private parties must ordinarily explore other avenues of redress.”<sup>736</sup>

The Supreme Court and the lower federal courts have generally treated color of state law and state action as meaning the same thing.<sup>737</sup> A finding that the defendant was engaged in state action means that the defendant acted under color of state law.<sup>738</sup> If the defendant was not engaged in state action, the Fourteenth Amendment is not implicated, and there is no reason for a court to determine whether the defendant acted under color of state law.

Normally, when the § 1983 defendant argues that there was no state action (or actions under color of state law), the federal court will proceed directly to the state action/color of state law issue because if the plaintiff has not established the requisite state action, it will be unnecessary to resolve the constitutional merits, e.g., the First or Fourth Amendment issues. From time to time, however, a federal court that has concluded that there has been no constitutional violation will assume the existence of state action, and proceed directly to the constitutional merits.<sup>739</sup> Courts sometimes find other reasons for avoiding state action issues.<sup>740</sup>

### I. State and Local Officials

The clearest case of state action (and action under color of state law) is that of a public official who carried out her official responsibilities in accordance with state law. For example, law enforcement officers who carry out their official responsibilities in accordance with state law are engaged in state action and action under color of state law. *Polk County v. Dodson*<sup>741</sup> is the only Supreme Court decision that has found that a state or local official who carried out her official responsibilities was not engaged in state action. The Court held that a public defender’s representation of an indigent criminal defendant was not under color of state law.<sup>742</sup> It rea-

soned that although the public defender is employed and paid by the state, when representing a criminal defendant he acts not for the state, but as an adversary of the state; and not under color of state law, but pursuant to the attorney–client relationship with undivided loyalty to his client. However, as the Court in *Polk County* acknowledged, a public defender may be sued under § 1983 for carrying out her administrative functions.<sup>743</sup>

In *West v. Atkins*,<sup>744</sup> the Supreme Court held that a private physician who provides medical services to prisoners pursuant to a contract with the state acts under color of state law. Although the prison physician’s exercise of professional judgment may seem autonomous, it is on behalf of the state, and in furtherance of the state’s obligation to provide medical care to inmates. The decision in *West* is based primarily on the fact that the prison physician performs a governmental function and carries out the state’s constitutional obligation of providing medical care to prison inmates.<sup>745</sup>

State and local officials who abuse their official power act under color of state law. The governing principle is that “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken “under color of” state law.”<sup>746</sup>

Courts often must decide whether an official, on the one hand, abused governmental power or, on the other hand, acted as a private individual.<sup>747</sup> The issue often arises with respect to off-duty police officers. To determine whether an off-duty police officer acted under color of state law, courts consider such factors as whether an ordinance deemed the officer on duty for twenty-four hours; the officer identified herself as a police officer; the officer had or showed her service revolver or other police department weapon; the officer flashed her badge; the officer conducted a search or made an arrest; the officer intervened in an existing dispute pursuant to police department regulations (as opposed to instigating a dispute).<sup>748</sup>

## II. State Action Tests

Courts often must decide whether a private party’s involvement with state or local government justifies the conclusion that the party was engaged in “state action” for the purpose of the Fourteenth Amendment. The state action requirement of the Fourteenth Amendment is designed to preserve a private sphere free of constitutional restraints, as well as to ensure “that constitutional standards are invoked when it can be said that the state is re-

sponsible for the specific conduct of which the plaintiff complains.”<sup>749</sup> The Supreme Court has advanced the following state action tests (discussed in the next four subsections):

- symbiotic relationship;
- public function;
- close or joint nexus;
- joint participation; and
- pervasive entwinement.

Not all the Court’s state action holdings have been based on one of the above doctrines, however. At times, the Court has found state action based on essentially ad hoc evaluations of a variety of connections between the private party and the state, such as in cases involving a private party’s exercise of a peremptory challenge and a private physician’s provision of medical care to inmates pursuant to a contract with the state.<sup>750</sup> The Court has acknowledged that its state action decisions “‘have not been a model of consistency.’”<sup>751</sup> The nature of the government involvement with the private party can give rise to disputed questions of fact. Nevertheless, the courts decide a large percentage of state action issues as a matter of law.

#### A. Symbiotic Relationship

The Supreme Court’s decision in *Burton v. Wilmington Parking Authority*<sup>752</sup> is often cited to support the principle that state action is present when the state and private party have a symbiotic relationship.<sup>753</sup> Although *Burton* has not been overruled, the Court has read it narrowly, as supporting a finding of state action only when the state profited from the private wrong.<sup>754</sup> Furthermore, the Court has denigrated *Burton* as one of its “early” state action decisions containing “vague” “joint participation” language.<sup>755</sup>

#### B. Public Function

Supreme Court decisions hold that there is state action when a private party carries out a function that has been historically and traditionally the “exclusive” prerogative of the state.<sup>756</sup> This is a demanding standard that § 1983 plaintiffs find very difficult to satisfy. While many functions may be historically and traditionally governmental functions, few are “exclusively” governmental functions. The Supreme Court has found state action under the public function doctrine in cases involving po-

litical primaries,<sup>757</sup> and it has stated that eminent domain is an example of an exclusively governmental power.<sup>758</sup> The Court's decision in *West v. Atkins*,<sup>759</sup> that a private physician's provision of medical care to prison inmates constitutes state action, was based in part on the fact that the physician carries out the governmental function of providing medical care to inmates.<sup>760</sup>

The Supreme Court has held that the following functions do not satisfy the public function doctrine because they are not "exclusively" governmental functions:

1. insurance companies' suspension of workers' compensation benefits pending utilization committee review;<sup>761</sup>
2. education of maladjusted children;<sup>762</sup>
3. nursing home care;<sup>763</sup>
4. coordination of amateur athletics;<sup>764</sup>
5. dispute resolution through forced sale of goods by a warehouse company to enforce a possessory lien;<sup>765</sup>
6. operation of a shopping mall;<sup>766</sup> and
7. provision of utility services.<sup>767</sup>

### C. Close Nexus Test

Under the "sufficiently close nexus" test, state action is present if the state ordered the private conduct, or "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."<sup>768</sup> The federal courts have held that the following are not sufficient to satisfy this test:

1. state authorization of private conduct;<sup>769</sup>
2. a private party's use of a state furnished dispute resolution mechanism;<sup>770</sup>
3. a private party's request for police assistance;<sup>771</sup>
4. a private party's attempt to influence governmental action;<sup>772</sup>
5. state licensing and regulation, even if pervasive;<sup>773</sup> and
6. state financial assistance, even if extensive.<sup>774</sup>

The Supreme Court has found no state action even when several of these indicia of government involvement coalesced in the same case. The Court has held that private parties (such as a utility company, a



private school, and a nursing home) that were extensively regulated by the state, received substantial governmental assistance, carried out an important societal function, and acted pursuant to state authority, were not engaged in state action.<sup>775</sup>

#### D. Joint Action

A private party who jointly participates in the alleged constitutional wrongdoing with a state or local official is engaged in state action.<sup>776</sup> Joint participation requires (1) some type of conspiracy, agreement, or concerted action between the state and private party; (2) a showing that the state and private party shared a common goal to violate plaintiff's federally protected rights; and (3) conduct pursuant to the conspiracy, agreement, or concerted action that violated the plaintiff's federally protected rights. In *Dennis v. Sparks*,<sup>777</sup> the Supreme Court held that private parties who corruptly conspire with a judge act under color of state law, even though the judge is protected by judicial immunity.<sup>778</sup>

In *National Collegiate Athletic Ass'n v. Tarkanian*,<sup>779</sup> the Supreme Court held that there was no joint action between the NCAA, a private entity, and the state university because they had diametrically opposite goals. The NCAA's goal was that the university's head basketball coach be suspended, while the university sought to retain its prominent head coach.

Although a private party's mere use of a state statute, alone, does not constitute state action,<sup>780</sup> when combined with the participation of state officials it can signify state action.<sup>781</sup> In *Lugar v. Edmondson Oil Co.*,<sup>782</sup> the Supreme Court held that a creditor who used a state prejudgment attachment statute acted under color of state law because, in attaching the debtor's property, with help from the court clerk and sheriff, the creditor used state power. The assistance from state officials made the creditor a joint participant in state action.<sup>783</sup>

#### E. Pervasive Entwinement

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,<sup>784</sup> the Supreme Court held that a statewide interscholastic athletic association was engaged in state action because the state was "pervasively entwined" with the association. The Court relied heavily on the fact that, because almost all of the state's public schools were members of the association, there was a "largely overlapping identity" between the asso-

ciation and the state's public schools. The Court also relied on the facts that the association's governing board was dominated by public school officials; most of the association's revenue was derived from governmental funds; and the association carried out a function that otherwise would have to be carried out by the state board of education. Unfortunately, the Court did not define "pervasive entwinement,"<sup>785</sup> thereby leaving it to the lower courts to determine on a case-by-case basis.<sup>786</sup>

## 8. Section 1983 Defendants

Section 1983 authorizes assertion of a claim for relief against a “person” who acted under color of state law. A suable § 1983 “person” encompasses state and local officials sued in their personal capacities, municipal entities, and municipal officials sued in an official capacity; and private parties engaged in state action, but not states and state entities.

### I. State Defendants

In *Will v. Michigan Department of State Police*,<sup>787</sup> the Supreme Court held that a suable “person” under § 1983 does not include a state, a state agency, or a state official sued in her official capacity for damages. However, the Court ruled that a state official sued in an official capacity is a “person” for purposes of § 1983 when sued for prospective relief.<sup>788</sup> In *Hafer v. Melo*,<sup>789</sup> the Court held that a state official sued for damages in her personal capacity is a person under § 1983, even though the claim for relief arose out of the official’s official responsibilities.

The Court’s interpretation of “suable § 1983 person” in *Will* was heavily influenced by the scope of sovereign immunity enjoyed by the states under the Eleventh Amendment.<sup>790</sup> The Court found that § 1983 was not “intended to disregard the well established [Eleventh Amendment] immunity of a State from being sued without its consent.”<sup>791</sup> Further, *Will*’s bifurcated definition of “person,” barring claims for monetary relief against states, state agencies and state officials in their official capacities, while allowing claims for prospective relief against state officials in their official capacities, is based upon, and consistent with, Eleventh Amendment decisional law.<sup>792</sup> The Supreme Court has indicated that the *Will* “no person” defense is not waivable.<sup>793</sup>

### II. Interplay of “Person” and Eleventh Amendment Issues

If a state defendant asserts that it is “not a person” for the purposes of § 1983, along with an Eleventh Amendment defense, the court should first address the “person” defense. In *Vermont Agency of Natural Resources v. United States*,<sup>794</sup> a federal court *qui tam* action under the federal False Claims Act against the state of Vermont, Vermont argued that (1) it was not a “person” subject to suit under the act, and (2) the suit was barred by the

Eleventh Amendment. The Supreme Court ruled that when the defendant asserts both “person” and Eleventh Amendment defenses, the court should first determine the “person” issue. The Court said that although questions of jurisdiction are usually given “priority,” it has routinely first addressed whether the federal statute “itself *permits* the cause of action it creates to be asserted against States” before ruling on the Eleventh Amendment defense.<sup>795</sup> The statutory question is “logically antecedent” to the Eleventh Amendment defense, and “there is no realistic possibility that addressing the statutory question will expand the Court’s power beyond the limits that the jurisdictional restriction has imposed.”<sup>796</sup> The Court observed that the “person” and Eleventh Amendment issues are closely related to each other: “The ultimate issue in the statutory inquiry is whether States can be sued under this statute; and the ultimate issue in the Eleventh Amendment inquiry is whether unconsenting States can be sued under this statute.”<sup>797</sup> Relying in part upon the holding in *Will*, that states are not “persons” within the meaning of § 1983, the Court in *Vermont Agency* held that states are not also not “persons” within the meaning of the False Claims Act. In light of this determination, the Court in *Vermont Agency* found no need to rule on the Eleventh Amendment defense.

The Seventh Circuit, in *Power v. Summers*,<sup>798</sup> held that the Supreme Court’s decision in *Vermont Agency* applies to § 1983 actions. “Since section 1983 does not authorize suits against states (states not being ‘persons’ within the statute’s meaning), the district court should have dismissed the official-capacity claims before addressing the Eleventh Amendment defense, the sequence ordained by *Vermont Agency* . . . .”<sup>799</sup>

Because *Will*’s definition of suable § 1983 “person” was influenced by, and is consistent with, the scope of the Eleventh Amendment, a federal court that follows the sequence set forth in *Vermont Agency* and *Power* should find it unnecessary to reach the Eleventh Amendment issue.<sup>800</sup> Nevertheless, numerous lower federal court rulings are based solely upon the Eleventh Amendment.<sup>801</sup>

In some cases, this phenomenon undoubtedly reflects the fact that the defendant raised an Eleventh Amendment defense and failed to assert the “no-person” defense. In any case, because the Eleventh Amendment defense is adjudicated so frequently in § 1983 actions, it is analyzed *infra* Chapter 14.

### III. Municipal Defendants

In *Monell v. Department of Social Services*,<sup>802</sup> the Supreme Court held that municipalities and municipal officials sued in an official capacity are suable § 1983 persons.<sup>803</sup> In *Will v. Michigan Department of State Police*,<sup>804</sup> the Court carefully distinguished municipal liability from state liability. A claim against a municipal official in her official capacity is tantamount to a suit against the municipal entity.<sup>805</sup> Thus when claims are asserted against both the municipal entity and a municipal official in her official capacity, federal courts consistently dismiss the official capacity claim as “redundant” to the municipal-entity claim.<sup>806</sup>

### IV. State Versus Municipal Policy Maker

Because Supreme Court decisional law defining suable § 1983 person distinguishes between state liability and municipal liability, federal courts sometimes have to decide whether an official is a state, as opposed to municipal, policy maker in a particular subject area, or on a particular issue. The resolution of this issue can determine whether a particular defendant is suable under § 1983 because, as discussed above, municipal entities are suable § 1983 persons while state entities are not. In addition, Eleventh Amendment sovereign immunity protects state entities from federal court liability but provides no protection for municipal entities.<sup>807</sup>

In *McMillian v. Monroe County*,<sup>808</sup> the Supreme Court held that whether an official is a state or municipal policy maker is “dependent on an analysis of state law.”<sup>809</sup> The Court recognized that a particular official (e.g., the county sheriff) may be considered a state official in one state and a municipal official in another state.<sup>810</sup> Furthermore, an official may be considered a state official for the purpose of one governmental function and a municipal official for the purpose of another governmental function.<sup>811</sup> For example, district attorneys are normally considered state officials when prosecuting crimes, but are considered municipal officials when carrying out their administrative duties, such as training staff.<sup>812</sup>

### V. Departments, Offices, and Commissions

In § 1983 actions, municipal departments, offices, and commissioners are normally not considered suable entities.<sup>813</sup> This is a matter of form rather than substance. It means simply that instead of naming, for example, the “police department” as a party defendant, the plaintiff must name as de-

fendant the municipality (city, town, or village) of which the department is a part.

## 9. Causation

By its terms, § 1983 authorizes the imposition of liability only on a defendant who “subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights” guaranteed by federal law. The Supreme Court has read this language as imposing a proximate cause requirement on § 1983 claims.<sup>814</sup> The great weight of judicial authority equates § 1983’s causation requirement with common-law proximate cause.<sup>815</sup> This reading of § 1983 is consistent with the fundamental principle that § 1983 should be interpreted “against the background of tort liability that makes a [person] responsible for the natural consequences of his [or her] actions.”<sup>816</sup>

A § 1983 defendant “may be held liable for ‘those consequences attributable to reasonably foreseeable intervening forces, including acts of third parties.’”<sup>817</sup> The requisite causal connection is satisfied if the defendant “set in motion a series of events” he knew or reasonably should have known would cause third parties to violate the plaintiff’s constitutional rights.<sup>818</sup> On the other hand, a § 1983 defendant may not be held liable when an intervening force was not reasonably foreseeable or when the link between the defendant’s conduct and the plaintiff’s injuries is too remote, tenuous, or speculative.<sup>819</sup> “In the context of criminal law enforcement, courts have differed as to the circumstances under which acts of subsequent participants in the legal system are superseding causes that avoid liability of an initial actor.”<sup>820</sup> Causation in § 1983 actions is usually a question of fact for the jury.<sup>821</sup>

The proximate cause requirement applies to all § 1983 claims, whether against a subordinate or supervisory officer or governmental entity. In *Los Angeles County v. Humphries*,<sup>822</sup> the Supreme Court said the causation required under § 1983 for municipal liability claims does not “change with the form of relief sought.”<sup>823</sup> The Court relied upon § 1983’s language that a person “shall be liable . . . in an action at law, suit in equity, or other proper proceeding for redress.”<sup>824</sup>

Very often multiple officials are involved in governmental decision-making, and the actions of more than one of them may be a proximate cause of the contested governmental decision. In *Staub v. Proctor Hospital*,<sup>825</sup> a case under the Uniformed Services Employment and Reemployment Rights Act, which prohibits employment discrimination against members of the military, the Supreme Court held that under common law proximate cause

principles, “if a supervisor performs an act motivated by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action [by the decision maker], then the employer is liable under” the Federal Act.<sup>826</sup>

The Court in *Staub* stated that when Congress creates a federal tort it adopts “the background of general tort law,” including “the traditional tort-law concept of proximate cause.”<sup>827</sup> With respect to the specific causation issue before the Court, the Court said:

[I]t is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent’s action (and hence the earlier agent’s discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only “some direct relation between the injury asserted and the injurious conduct alleged,” and excludes only those “link[s] that are too remote, purely contingent or indirect.” [T]he ultimate decisionmaker’s exercise of judgment [does not] automatically render [ ] the link to the supervisor’s bias “remote” or “purely contingent.” The decisionmaker’s exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. Nor can the ultimate decisionmaker’s judgment be deemed a superseding cause of the harm. A cause can be thought “superseding” only if it is a “cause of independent origin that was not foreseeable.”<sup>828</sup>

The Court ruled that the employer may be liable even though the ultimate decision maker exercised independent judgment, and even if the ultimate decision maker conducted an independent investigation (and rejection) of the employee’s allegations of a supervisor’s discriminatory animus.<sup>829</sup>

[I]f the employer’s investigation results in an adverse action for reasons unrelated to the supervisor’s original biased action . . . , then the employer will not be liable. But the supervisor’s biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified. . . . [A]n employer’s mere conduct of an independent investigation . . . [does not] relieve[ ] the employer of “fault.” The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision. . . .

Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimina-



tion is a motivating factor in his doing so, it is a “motivating factor in the employer’s action ....”<sup>830</sup>

In the author’s view, because § 1983 is interpreted against the background of common law tort principles including proximate cause, *Staub* very likely applies to § 1983 actions in which multiple officials participate in the contested governmental action.<sup>831</sup>

In an important decision, the First Circuit, in *Drumgold v. Callahan*,<sup>832</sup> recently held that § 1983 causation principles must be consistent with the principles governing the plaintiff’s constitutional claim. The plaintiff in *Drumgold* asserted a § 1983 *Brady v. Maryland*<sup>833</sup> claim, based upon failure to disclose exculpatory evidence, against the defendant, a homicide detective. The jury returned a verdict for the wrongfully convicted plaintiff of \$14 million, but the First Circuit reversed because of a causation instruction that clashed with the *Brady* materiality prong requirement of a reasonable probability that if the exculpatory material had been disclosed, the result would have been different. The First Circuit stressed that in § 1983 actions, district courts must apply “only those tort causation principles that are compatible with the underlying constitutional right.”<sup>834</sup> The district court’s instruction that there may be concurrent causes for the plaintiff’s injury was incompatible with the *Brady* materiality requirement of a reasonable probability that he would not have been convicted *but for* the defendant’s withholding of exculpatory evidence. It is not sufficient that the suppression of evidence was merely one cause of the wrongful conviction. The First Circuit held that the district court should have instructed the jury that the plaintiff was required to demonstrate, by a preponderance of the evidence, that he would not have been convicted but for the defendant’s suppression of the exculpatory evidence.

Causation frequently plays a significant role in § 1983 municipal liability claims based on allegedly inadequate training, supervision, or hiring practices.<sup>835</sup> For these municipal liability claims, Supreme Court decisional law states that the municipal policy or practice must be the “moving force” for, “closely related” to, a “direct causal link” to, or “affirmatively linked” to the deprivation of the plaintiff’s federally protected rights.<sup>836</sup> It is unclear whether these standards are alternative ways of articulating common-law proximate cause or are intended to impose a more stringent causation requirement.<sup>837</sup>

## 10. Capacity of Claim: Individual Versus Official Capacity

A claim against a state or municipal official in her official capacity is treated as a claim against the entity itself.<sup>838</sup> In *Kentucky v. Graham*,<sup>839</sup> the Supreme Court stated that an official capacity claim is simply “‘another way of pleading an action against an entity of which an officer is an agent.’ As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”<sup>840</sup> Therefore, when a § 1983 complaint asserts a claim against a municipal entity and municipal official in her official capacity, federal district courts routinely dismiss the official capacity claim as duplicative or redundant.<sup>841</sup> By contrast, a personal-capacity (or individual-capacity) claim seeks monetary recovery payable out of the responsible official’s personal finances,<sup>842</sup> and thus is not redundant or duplicative of a claim against a governmental entity.<sup>843</sup>

In *Hafer v. Melo*,<sup>844</sup> the Supreme Court outlined the distinctions between personal-capacity and official-capacity claims:

1. Because an official-capacity claim against an official is tantamount to a claim against a governmental entity, and because there is no respondeat superior liability under § 1983, in official capacity suits the plaintiff must show that enforcement of the entity’s policy or custom caused the violation of the plaintiff’s federally protected right.
2. In official capacity suits the defendant may assert only those immunities the entity possesses, such as the states’ Eleventh Amendment immunity and municipalities’ immunity from punitive damages.
3. Liability may be imposed against defendants in personal-capacity suits even if the violation of the plaintiff’s federally protected right was not attributable to the enforcement of a governmental policy or practice. “[T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.”<sup>845</sup>
4. Personal-capacity defendants may assert common-law immunity defenses—that is, either an absolute or qualified immunity.<sup>846</sup>

The Seventh Circuit held that when a municipal official is sued in her personal capacity, the municipality is not an indispensable party, even if it may be responsible for a judgment against the official.<sup>847</sup>

The § 1983 complaint should clearly specify the capacity (or capacities) in which the defendant is sued. Unfortunately, many § 1983 complaints fail to do so. When the capacity of claim is ambiguous, most courts look to the “course of proceedings” to determine the issue.<sup>848</sup> For example, when a municipal official is sued under § 1983, assertion of a claim for punitive damages is a strong indicator that the claim was asserted against the official in his personal capacity, because municipalities are immune from punitive damages under § 1983. By the same token, when the defendant/official asserts an absolute or qualified immunity as a defense, this strongly indicates that the claim was asserted against the official personally because these defenses are available only against personal-capacity claims.

## 11. Municipal Liability

### I. Fundamental Principles of § 1983 Municipal Liability

In its landmark decision, *Monell v. Department of Social Services*,<sup>849</sup> the Supreme Court held that municipal entities are subject to § 1983 liability, but not on the basis of respondeat superior.<sup>850</sup> Therefore, a municipality may not be held liable under § 1983 solely because it hired an employee who became a constitutional wrongdoer. *Monell* established that a municipality is subject to liability under § 1983 only when the violation of the plaintiff's federally protected right can be attributable to the enforcement of a municipal policy, practice, or decision of a final municipal policy maker.<sup>851</sup> “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”<sup>852</sup> A model general municipal liability jury instruction is in the Appendix (*see infra* Model Instruction 5).

#### A. Claims for Prospective Relief

In *Los Angeles County v. Humphries*,<sup>853</sup> the Supreme Court held that *Monell*'s “policy or custom” requirement is not limited to claims for damages, and pertains also to claims for prospective relief, such as an injunction or declaratory judgment. The Court relied on the language of § 1983, its legislative history, and the decision in *Monell*. It found that

Nothing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought. In fact, the text suggests the opposite when it provides that a person who meets § 1983's elements “shall be liable... in an action at law, suit in equity, or other proper proceeding for redress.”<sup>854</sup>

The Court pointed to *Monell*'s analysis of § 1983 legislative history, and specifically Congress's rejection of the Sherman Amendment, which showed Congress's intent that a municipality, may be held liable only for its own wrongs and not solely because it employed a tortfeasor. *Humphries* also relied on language in *Monell* that local governing bodies may be held liable “under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes” a municipal policy or custom.<sup>855</sup> To hold the “policy

or practice” requirement inapplicable to claims for prospective relief “would undermine *Monell*’s logic. For whether an action or omission is a municipality’s ‘own’ [wrong] has to do with the nature or omission, not with the nature of the relief that is later sought in Court.”<sup>856</sup>

B. No Good-Faith Immunity, But Immunity from Punitive Damages

In *Owen v. City of Independence*,<sup>857</sup> the Supreme Court held that a “municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.”<sup>858</sup> In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>859</sup> the Court held that “unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified under § 1983.”<sup>860</sup> Although compensatory damages and equitable relief may be awarded against a municipality under § 1983,<sup>861</sup> the Court, in *City of Newport v. Fact Concerts, Inc.*,<sup>862</sup> held that municipalities are immune from punitive damages. It found that because an award of punitive damages against a municipality would be payable from taxpayer funds, the award would not further the deterrent and punishment goals of punitive damages. These goals are best accomplished by awards of punitive damages against officials in their personal capacity. Punitive damages, however, may be awarded under § 1983 against a state or municipal official in her individual capacity.<sup>863</sup>

C. Municipal Policies and Practices

Under Supreme Court decisional law, municipal liability may be based on (1) an express municipal policy, such as an ordinance, regulation, or policy statement; (2) a “widespread practice that, although not authorized by written law or express municipal policy, is ‘so permanent and well settled as to constitute a custom or usage’ with the force of law”,<sup>864</sup> or (3) the decision of a person with “final policymaking authority.”<sup>865</sup> The following types of municipal policies and practices may give rise to § 1983 liability:

1. deliberately indifferent training;<sup>866</sup>
2. deliberately indifferent supervision or discipline;<sup>867</sup>
3. deliberately indifferent hiring;<sup>868</sup> and
4. deliberately indifferent failure to adopt policies necessary to prevent constitutional violations.<sup>869</sup>

#### D. Causation

There must be a sufficient “causal connection” between the enforcement of the municipal policy or practice and the violation of the plaintiff’s federally protected right. A municipality may be held liable under § 1983 only when the enforcement of the municipal policy or practice was the “moving force” behind the violation of the plaintiff’s federally protected right.<sup>870</sup> The Supreme Court has also referred to this “causal connection” as a “direct causal link,” “closely related,” and “affirmatively linked.”<sup>871</sup> It is unclear whether these formulations are just alternative ways to describe proximate cause in the municipal liability context, or whether they impose a more rigorous causation requirement.<sup>872</sup>

#### E. Separation of Constitutional Violation and Municipal Liability Issues

In *Collins v. City of Harker Heights*,<sup>873</sup> the Supreme Court stressed that the issue of whether there is a basis for imposing municipal liability for the violation of the plaintiff’s federally protected rights is separate and distinct from the issue of whether there was a violation of the plaintiff’s federal rights. A “proper analysis requires [the separation of] two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff’s harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.”<sup>874</sup>

### II. Officially Promulgated Policy

Usually the easiest cases concerning § 1983 municipal liability arise out of claims contesting the enforcement of an officially promulgated municipal policy. There was such a policy in the *Monell* case.<sup>875</sup>

The challenged policy statement, ordinance, regulation, or decision must have been adopted or promulgated by the local entity. A local government’s *mere enforcement* of state law, as opposed to express incorporation or adoption of state law into local regulations or codes, has been found insufficient to establish *Monell* liability.<sup>876</sup> In *Cooper v. Dillon*,<sup>877</sup> the Eleventh Circuit held that the city could be held liable under § 1983 for its enforcement of an unconstitutional state statute because the city, by ordinance, had adopted the state law as its own. Furthermore, enforcement of the law was by the city police commissioner, an official with policy-making authority.<sup>878</sup> In another case, the Eleventh Circuit held that if the municipal policy was facially constitutional, the plaintiff must show that the city

“was deliberately indifferent to the known or obvious consequences of its policies.”<sup>879</sup>

### III. Municipal Policy Makers

#### A. Policy-Making Authority Versus Discretionary Authority

Supreme Court decisional law holds that municipal liability may be based on a single decision by a municipal official who has final policy-making authority.<sup>880</sup> Whether an official has final policy-making authority is an issue of law to be determined by the court by reference to state and local law.<sup>881</sup> The mere fact that a municipal official has discretionary authority is not a sufficient basis for imposing municipal liability.<sup>882</sup> It is not always easy to determine whether a municipal official has final policy-making authority as opposed to discretionary authority to enforce policy.<sup>883</sup>

In *Pembaur v. City of Cincinnati*,<sup>884</sup> a majority of the Supreme Court held that a single decision by an official with policy-making authority in a given area could constitute official policy, and be attributed to the government itself under certain circumstances.<sup>885</sup> The county prosecutor ordered local law enforcement officers to “go in and get” two witnesses who were believed to be inside the medical clinic of their employer, a doctor who had been indicted for fraud concerning government payments for medical care provided to welfare recipients. The officers had *capiases* for the arrest of the witnesses, but no search warrant for the premises of the clinic. Pursuant to the county prosecutor’s order, they broke down the door and searched the clinic.<sup>886</sup> In holding that the county could be held liable for the county prosecutor’s order that resulted in the violation of the plaintiff’s constitutional rights, the Court described the “appropriate circumstances” in which a single decision by municipal policy makers may give rise to municipal liability. It noted cases in which it had held that a single decision by a “properly constituted legislative body . . . constitute[d] an act of official government policy.”<sup>887</sup> *Monell*, for example, referred to officials “whose acts or edicts” could constitute official policy.<sup>888</sup> Thus, where a government’s authorized decision maker adopts a particular course of action, the government may be responsible for that policy “whether that action is to be taken only once or to be taken repeatedly.”<sup>889</sup>

The plurality opinion in *Pembaur*, written by Justice William J. Brennan, Jr., concluded that “[m]unicipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered.”<sup>890</sup> Whether an official possesses policy-making authority with respect to particular matters is determined by reference to state and local law. Policy-making authority may be bestowed by legislative enactment, or it may be delegated by an official possessing policy-making authority under state law.<sup>891</sup>

In *City of St. Louis v. Praprotnik*,<sup>892</sup> the Supreme Court again attempted “to determin[e] when isolated decisions by municipal officials or employees may expose the municipality itself to liability under [section] 1983.”<sup>893</sup> Justice Sandra Day O’Connor, writing for a plurality, reinforced the principle articulated in *Pembaur* that state law determines whether a municipal official has policy-making status.<sup>894</sup> Furthermore, identifying a policy-making official is a question of law for the court to decide by reference to state law, not one of fact to be submitted to a jury.<sup>895</sup> The plurality also underscored the importance of “finality” to the concept of policy making, and reiterated the distinction set out in *Pembaur* between authority to make final policy and authority to make discretionary decisions.<sup>896</sup> “When an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departures from them, are the act of the municipality.”<sup>897</sup> Finally, for a subordinate’s decision to be attributable to the government entity, “the authorized policymakers [must] approve [the] decision and the basis for it. . . . Simply going along with discretionary decisions made by one’s subordinates . . . is not a delegation to them of authority to make policy.”<sup>898</sup>

In *Jett v. Dallas Independent School District*,<sup>899</sup> the Supreme Court analyzed the respective functions of the judge and jury when municipal liability is sought to be premised upon the single decision of a municipal policy maker. The Court stated:

As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well as “‘custom or usage’ having the force of law” . . . , the trial judge must identify those officials of govern-



mental bodies who speak with final policy-making authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of [plaintiff's federally protected] rights.<sup>900</sup>

Although mentioned merely in passing without elaboration, the Court's reference to "custom or usage having the force of law" raises an interesting question. In *Praprotnik*, Justice O'Connor's plurality opinion and Justice Brennan's concurring opinion recognized that municipal liability may be based on a municipal practice that is at variance with a formally adopted announced policy.<sup>901</sup> The existence of a custom or practice normally presents an issue of fact for the jury.<sup>902</sup> In *Mandel v. Doe*,<sup>903</sup> the Eleventh Circuit stated that, to determine whether an official has final policy-making authority, "[t]he court should examine not only the relevant positive law, including ordinances, rules and regulations, but also the relevant customs and practices having the force of law."<sup>904</sup> There is thus a potential tension in *Jett* between the Court's holding that the identification of final policy makers is a question of law for the court, and its statement that the court should review the "legal materials," including a "'custom or usage' having the force of law." Nevertheless, when the issue of whether an official is a final policy maker has been raised, the courts have usually given little attention to *Jett*'s reference to "custom and usage," and have treated the final policy-making authority issue as a matter of state law for the court.

Because local ordinances, charters, regulations, and manuals may not be readily accessible, counsel should provide copies of the pertinent provisions to the court. In *Wulf v. City of Wichita*,<sup>905</sup> the issue was whether the city manager or the chief of police had policy-making authority over employment decisions. The Tenth Circuit observed that the record lacked "official copies of the City Charter or the relevant ordinances or procedure manuals for the City of Wichita."<sup>906</sup> Nevertheless, the Tenth Circuit was able to resolve the policy-making issue because the record contained testimony of the city manager about his duties, and the court was provided pertinent quotations from city ordinances. From these sources, the court found that only the city manager had final policy-making authority. The court was apparently willing to

accept these alternative sources only because the parties had briefed the appeal prior to the Supreme Court's determination in *Praprotnik* that the federal court should look to state law to decide where policy-making authority resides.<sup>907</sup>

In this post-*Praprotnik* era, however, counsel should submit copies of the pertinent local law provisions to the court. As noted, federal courts are not likely to have easy access to these materials and should not have to expend considerable effort tracking them down.<sup>908</sup> Further, because the contents of these legal documents are in issue, the original document rule<sup>909</sup> would normally render it improper for a court to rely on alternative materials, such as the testimony and quotations considered in *Wulf*.

*Judicial Notice.* If the pertinent local legislative materials are made available to the federal court, the court may take judicial notice of their contents.<sup>910</sup> In *Melton v. City of Oklahoma City*,<sup>911</sup> the Tenth Circuit took judicial notice of the fact that the city charter lodged final policy-making authority over the city's personnel matters in the city manager. Although "[t]here seem[ed] to be two conflicting lines of cases in [the Tenth Circuit] on the question of judicial notice of city ordinances," the court concluded that the "better rule" allows for the taking of judicial notice.<sup>912</sup> As the Tenth Circuit recognized, the Federal Rules of Evidence authorize the taking of judicial notice of a fact not subject to reasonable dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be determined."<sup>913</sup>

## B. State Versus Municipal Policy Maker

Federal courts frequently have to determine whether an official is a state or municipal policy maker. In *McMillian v. Monroe County*,<sup>914</sup> the Supreme Court held that, like the identification of municipal policy makers, this issue, too, is determined by reference to state law. The Court acknowledged that an official may be a state policy maker for one purpose and a municipal policy maker for another purpose.<sup>915</sup> For example, courts commonly hold that district attorneys are state policy makers when prosecuting criminal cases, but are municipal policy makers for purposes of carrying out administrative and supervisory functions, such as training of assistant district attorneys.<sup>916</sup>

In *McMillian*, a five-member majority of the Supreme Court held that a county sheriff in Alabama is not a final policy maker for the county in the area of law enforcement.<sup>917</sup> It stated that

the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, “all or nothing” manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policy makers for the local government in a particular area, or on a particular issue.... Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the County when he acts in a law enforcement capacity.<sup>918</sup>

The Court emphasized that state law governs a court’s determination of whether an official has final policy-making authority for a local government entity or for the state. As the Court acknowledged,

[t]his is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official’s functions under relevant state law.<sup>919</sup>

Relying heavily on the Alabama constitution and the Alabama supreme court’s interpretation of the state constitution that sheriffs are state officers, the U.S. Supreme Court found that Alabama sheriffs, when executing their law enforcement duties, represent the state of Alabama, not their counties. Even the presence of the following factors was not enough to persuade the majority of the Court otherwise: (1) the sheriff’s salary is paid out of the county treasury; (2) the county provides the sheriff with equipment, including cruisers; (3) the sheriff’s jurisdiction is limited to the borders of his county; and (4) the sheriff is elected locally by the voters in his county.<sup>920</sup> However, four dissenting justices, also relying on state law, came to the opposite conclusion, namely, that Alabama sheriffs are county policy makers.<sup>921</sup>

#### **IV. Custom or Practice**

In *Monell v. Department of Social Services*,<sup>922</sup> the Supreme Court recognized that § 1983 municipal liability may be based on a municipal “custom or

usage” having the force of law, even though it has “not received formal approval through the body’s official decision-making channels.”<sup>923</sup> The Supreme Court has acknowledged that “[a]n act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decision-maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.”<sup>924</sup> The critical issue is whether there was a particular custom or practice that was “so well settled and widespread that the policy-making officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.”<sup>925</sup> Although there are no “bright-line rules for establishing what constitutes a widespread custom or practice, it is clear that a single incident—or even three incidents—do not suffice.”<sup>926</sup>

In *Sorluccho v. New York City Police Department*,<sup>927</sup> the Second Circuit considered the sufficiency of the evidence showing that the New York City Police Department (NYPD) engaged in a pattern of disciplining probationary police officers that discriminated against female officers. The plaintiff, Ms. Sorluccho, was a probationary police officer of the NYPD. In 1983, John Mielko, a tenured NYPD officer, brutally and sexually assaulted her for six hours in her Nassau County, New York apartment. Mielko had located Ms. Sorluccho’s service revolver in her apartment, threatened her with it, and fired it into her bed.

Upon learning of the alleged attack, the NYPD made a perfunctory investigation that culminated in departmental charges being filed against Sorluccho for failing to safeguard her service revolver, and for failing to report that it had been fired. Nassau County officials subjected her to vulgar and abusive treatment and, in fact, filed criminal charges against her for having falsely stated that she did not know the man who raped her. Ultimately, the NYPD fired Ms. Sorluccho “for initially alleging and maintaining (for four days before she actually identified Mielko) that her attacker was simply named ‘John,’ while Mielko, the accused rapist, subsequently retired from the NYPD with his regular police pension.”<sup>928</sup>

Sorluccho brought suit under § 1983 and Title VII alleging that her termination was the product of unlawful gender discrimination. Her theory of liability on the § 1983 municipal liability claim was “that the NYPD engaged in a pattern of disciplining probationary officers, who had been arrested while on probation, in a discriminatory . . . manner based upon . . . gender.”<sup>929</sup> Although the jury rendered a verdict in favor of the plaintiff,

the district court granted the NYPD's motion for judgment n.o.v.,<sup>930</sup> setting aside the verdict on the § 1983 claim. The district court found (1) that there was no evidence linking the police commissioner to Sorluccho's discriminatory termination; and (2) "that no reasonable jury could infer an unconstitutional pattern or practice of gender discrimination from the evidence of disparate disciplinary treatment between male and female probationary officers who had been arrested."<sup>931</sup>

On the first point, the Second Circuit concluded that "[w]hile discrimination by the Commissioner might be sufficient, it was not necessary."<sup>932</sup> Although the court did not elaborate, what it apparently meant was that although a final decision of a municipal *policy maker* provides a potential basis for imposing municipal liability, so does a widespread custom or practice, even if of subordinates.<sup>933</sup> On the second point, the court found, contrary to the district court's evaluation of the evidence, that Ms. Sorluccho introduced "sufficient evidence from which the jury could reasonably infer an unconstitutional NYPD practice of sex discrimination."<sup>934</sup>

The plaintiff's evidence of a practice of sex discrimination can be broken down into three categories: (1) the way in which the NYPD investigated the plaintiff's complaint, including, most significantly, the dramatically different ways it reacted to Mr. Mielko and Ms. Sorluccho;<sup>935</sup> (2) expert testimony from an experienced former NYPD lieutenant with Internal Affairs that the "department's investigation of Mielko was dilatory and negligent";<sup>936</sup> and (3) a statistical study prepared by the NYPD regarding actions taken against probationary officers who had been arrested between 1980 and 1985. During this period, forty-seven probationary officers were arrested, twelve of whom resigned. Of the remaining thirty-five, thirty-one were male: twenty-two of the male officers were terminated and nine were reinstated. All four of the female officers who had been arrested were terminated. The court of appeals disagreed with the district court's conclusion that the study was "statistically insignificant" because only four female officers were fired. The four women represented over 10% of the thirty-five probationary officers who were disciplined. While 100% of the female officers were terminated, only 63% of the male officers were fired. Although the statistical evidence by itself would probably have been an insufficient basis on which to find a discriminatory NYPD policy, it was sufficient when considered together with the evidence of the discriminatory treatment of Ms. Sorluccho.<sup>937</sup> The way the investigation of her complaint was handled

made the cold statistics come alive, at least to the extent that the jury could rationally reach the result it did.<sup>938</sup>

*Sorlucco* is important because of its careful analysis of the legal, factual, and evidentiary aspects of the “custom and practice” issue. Relatively few decisions have analyzed these issues with such care. The case also demonstrates how the plaintiff’s counsel creatively pieced together a case of circumstantial evidence substantiating the constitutionally offensive municipal practice.

In *Pineda v. City of Houston*,<sup>939</sup> the Fifth Circuit held, on summary judgment, that the plaintiff submitted insufficient evidence to create a triable issue that the Houston Southwest Gang Task Force was “engaged in a pattern of unconstitutional searches pursuant to a custom of the City.”<sup>940</sup> The plaintiffs produced reports of eleven warrantless entries into residences, but the court found that

[e]leven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation’s largest cities and police forces. The extrapolation fails both because the inference of illegality is truly un-compelling—giving presumptive weight as it does to the absence of a warrant—and because the sample of alleged unconstitutional events is just too small.<sup>941</sup>

The Fifth Circuit also found that the evidence was insufficient to impute constructive knowledge to the city’s policy makers. The opinions of plaintiffs’ experts that there was a pattern of unconstitutional conduct were also insufficient to create a triable issue of fact. “Such opinions as to whether or not policymakers had constructive knowledge do not create a fact issue, as the ‘experts’ were unable to muster more than vague attributions of knowledge to unidentified individuals in ‘management’ or the ‘chain of command.’”<sup>942</sup>

In *Gillette v. Delmore*,<sup>943</sup> the plaintiff, a firefighter, alleged that he had been suspended from his employment in retaliation for exercising his free speech rights. The Ninth Circuit held that the plaintiff failed to introduce sufficient proof of an alleged practice “that public safety employees wishing to criticize emergency operations should ‘be silent, cooperate, and complain later’ or risk disciplinary reprisals.”<sup>944</sup> The plaintiff failed to introduce evidence of a pattern of such disciplinary reprisals, or that the city manager or city council helped formulate or was even aware of such a pol-

icy. Further, the plaintiff presented no evidence as to how long the alleged practice had existed. Although the fire chief testified “that remaining silent during an emergency and complaining later was ‘a practice [among fire fighters] that we want to have followed,’” it was “too large a leap” to infer from the chief’s testimony that this reflected city policy.<sup>945</sup>

## V. Inadequate Training

### A. *City of Canton v. Harris*

In *City of Canton v. Harris*,<sup>946</sup> the Supreme Court, in an opinion by Justice White, held that deliberately indifferent training may give rise to § 1983 municipal liability. The Court rejected the city’s argument that municipal liability can be imposed only where the challenged policy itself is unconstitutional, and found that “there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.”<sup>947</sup> It held that § 1983 municipal liability may be based on inadequate training “only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact,” and that deliberate indifference was the moving force of the violation of the plaintiff’s federally protected right.<sup>948</sup> The plaintiff must demonstrate *specific* training deficiencies and either (1) a pattern of constitutional violations of which policy-making officials can be charged with knowledge, or (2) that training is obviously necessary to avoid constitutional violations, e.g., training on the constitutional limits on a police officer’s use of deadly force.<sup>949</sup>

*Canton* held that negligent or even grossly negligent training does not give rise to a § 1983 municipal liability claim. The Court ruled that the plaintiff must also demonstrate a sufficiently close causal connection between the deliberately indifferent training and the deprivation of the plaintiff’s federally protected right.<sup>950</sup>

The Supreme Court has stressed that *Canton*’s “objective obviousness” deliberate indifference standard for municipal liability inadequate training claims is different from *Farmer v. Brennan*’s<sup>951</sup> Eighth Amendment deliberate indifference standard, under which the official must be “subjectively” aware of the risk of “serious harm.”<sup>952</sup> The *Farmer* standard of deliberate indifference is used to determine whether there has been a constitutional (Eighth Amendment) violation. By contrast, the “objective obviousness” deliberate indifference standard in *Canton* is

used “for the . . . purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.”<sup>953</sup>

The Court in *Canton* ruled that a plaintiff must identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of the plaintiff’s constitutional injury.<sup>954</sup> The plaintiff will not prevail merely by showing that the particular officer who committed the constitutional violation was inadequately trained, or that there was negligent administration of an otherwise adequate program, or that the conduct resulting in the injury could have been avoided by more or better training.<sup>955</sup> The federal courts are not to become involved “in an endless exercise of second-guessing municipal employee-training programs.”<sup>956</sup>

The Ninth Circuit ruled that “[t]he deliberate-indifference inquiry should go to the jury if any rational factfinder could find [the] requisite mental state.”<sup>957</sup> In other words, where there are disputed issues of material fact, the jury must decide whether the municipality acted with deliberate indifference.<sup>958</sup> A model jury instruction for a municipal liability inadequate training or supervision claim is in the Appendix (see *infra* Model Instruction 6).

The Court acknowledged that the trier of fact may be confronted with difficult factual issues concerning alleged deliberately indifferent training deficiencies and causation. “Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the fact-finder, particularly since matters of judgment may be involved and since officers who are well trained are not free from error and perhaps might react much like [an] untrained officer.”<sup>959</sup> Nevertheless, the Court expressed optimism that judges and juries would be able to resolve these issues.

In her concurring opinion, Justice O’Connor recognized that, where there is “a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face, . . . failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue.”<sup>960</sup> O’Connor also recognized that municipal liability on a “failure to train” theory might be established

where it can be shown that policy makers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise



of police discretion. . . . Such a [pattern] could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements.<sup>961</sup>

Thus, both the majority and O'Connor's concurrence in *Canton* identified two different ways in which the plaintiff may establish a deliberately indifferent failure-to-train.<sup>962</sup> First, deliberate indifference may be established by demonstrating a failure to train officials in a specific area where there is an obvious need for training in order to avoid violations of citizens' constitutional rights.<sup>963</sup> Second, a municipality may be held responsible under § 1983 where a pattern of unconstitutional conduct is so pervasive as to imply actual or constructive knowledge of the conduct on the part of policy makers, whose deliberate indifference to the unconstitutional practice is evidenced by a failure to correct the situation once the need for training became obvious.<sup>964</sup>

B. *Connick v. Thompson*

In *Connick v. Thompson*<sup>965</sup> the Court held, 5–4, that a municipality's district attorney's office cannot be held liable under § 1983 based upon failure to adequately train assistant district attorneys (ADAs) about their due process *Brady*<sup>966</sup> obligations to turn over exculpatory material to the defense, unless the plaintiff demonstrates a pattern of *Brady* violations by the ADAs. Justice Thomas wrote the opinion for the Court.

In 1985, John Thompson was charged in New Orleans with a homicide. "Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker," and Thompson was charged with attempted armed robbery.<sup>967</sup> A crime scene technician took a swatch of fabric stained with the robber's blood from one of the robbery victim's pants, and sent it to the crime laboratory. Two days before the robbery trial, ADA Whittaker received the crime lab report, finding that the perpetrator of the robbery had Type B blood. The ADA never had Thompson's blood tested, did not know his blood type, and never disclosed the lab report to Thompson's counsel. (After Thompson discovered the lab report in 1999, former ADA Riehlmann revealed that ADA Deegan, who tried the robbery case with ADA Williams, "intentionally suppressed blood evidence" that exculpated

Thompson.)<sup>968</sup> Thompson was convicted of the armed robbery and, because of that conviction, chose not to testify on his own behalf in his trial a few weeks later for murder. In 1987, Thompson was convicted of murder and sentenced to death, and spent eighteen years in prison, including fourteen years on death row. One month before Thompson's scheduled execution, his investigators discovered the undisclosed crime lab report. A state appeals court reversed Thompson's armed robbery and murder convictions. The DA's office retried Thompson for murder, and the jury found him not guilty.

Thompson filed a § 1983 complaint in federal district court for damages against the Orleans Parish District Attorney (and others) alleging, *inter alia*, that District Attorney Connick failed to train his prosecutors adequately about their *Brady* obligations. The jury awarded Thompson \$14 million, and the Fifth Circuit en banc affirmed by an equally divided vote. The Supreme Court reversed, holding that a district attorney's office may not be held liable under § 1983 for failure to train based on a single *Brady* violation.<sup>969</sup>

*Connick* reaffirmed that in "limited circumstances" deliberately indifferent training may constitute a municipal policy justifying the imposition of § 1983 liability, and that deliberate indifference is a "stringent fault standard, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."<sup>970</sup> The court ruled that "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," because this theory of municipal liability comes perilously close to vicarious liability.<sup>971</sup> However, "[w]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers chose to retain that program."<sup>972</sup>

The Court in *Connick* ruled that

*A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. . . . Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.*<sup>973</sup>

The Court found that Thompson failed to establish a pattern of *similar* constitutional violations. Although Louisiana courts overturned four convictions on *Brady* grounds prior to Thompson's armed robbery trial,

[t]hose four reversals could not have put [District Attorney] Connick on notice that the officer's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.<sup>974</sup>

Unfortunately, the Court did not articulate how similar the constitutional violations must be to constitute a pattern.

Further, the fact that in Thompson's robbery prosecution as many as four prosecutors "may have been responsible for the nondisclosure of the crime lab report and, according to [Thompson's] allegations, withheld additional evidence in his armed robbery and murder trials," did not take this case out of the "single incident" category.<sup>975</sup> "[C]ontemporaneous or subsequent conduct cannot establish a pattern of [constitutional] violations that would provide 'notice to the [municipality] and the opportunity to conform to constitutional dictates . . .'"<sup>976</sup>

More fundamentally, the Court held, as a matter of law, that an inadequate training *Brady* claim against a district attorney's office requires a showing of a pattern of constitutional violations. The Court in *Connick* acknowledged that *Canton* left open the possibility that "in a narrow range of circumstances" a pattern of similar constitutional violations may not be necessary to show deliberate indifference and that a single incident may suffice,<sup>977</sup> and that *Canton* provided the example of the "obvious" need to train law enforcement officers in the constitutional limitations upon the use of deadly force.

The Court in *Connick* found that in "stark contrast" to police officers, assistant district attorneys are trained in the law, normally law school graduates, and thus able to find, understand, and apply legal rules; may be required to satisfy continuing legal education requirements; train on the job, often under the supervision of more experienced attorneys; and are bound by the rules of ethics to comply with *Brady*.<sup>978</sup> In these

circumstances, in the absence of a pattern of constitutional violations, a district attorney is entitled to rely on the prosecutors' professional training and ethical obligations.

The Court ruled that the fact that the prosecutors in fact may not have been trained about *particular Brady* issues is too nuanced to support an inference of deliberate indifference.<sup>979</sup> Further, the absence of *formal* training does not establish deliberate indifference, and "showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability."<sup>980</sup>

Justice Ginsburg, dissenting, disagreed strongly with the majority's absolute requirement that the § 1983 plaintiff demonstrate a pattern of *Brady* violations by assistant district attorneys.<sup>981</sup>

### C. *Canton* and *Connick*

*Canton* and *Connick* impose stringent standards for fault ("deliberate indifference") and causation ("moving force") in § 1983 municipal liability cases based upon inadequate training. As noted earlier, the Court in *Canton* expressly stated that federal courts should not lightly second-guess municipal training policies. Although numerous municipal liability claims based on inadequate training have been alleged, only a relatively small percentage of these claims have succeeded.<sup>982</sup>

## VI. Inadequate Hiring

In limited circumstances, § 1983 municipal liability may be based on deficiencies in hiring. In *Board of County Commissioners v. Brown*,<sup>983</sup> the Supreme Court held that municipal liability can be premised upon a municipality's deliberately indifferent hiring of a constitutional wrongdoer, but only if the plaintiff demonstrates that the hired officer "was highly likely to inflict the *particular* injury suffered by the plaintiff."<sup>984</sup> The Court acknowledged that the fault and causation standards for inadequate hiring claims are even more stringent than for inadequate training claims.<sup>985</sup> To "prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policy maker's inadequate decision and the particular injury alleged."<sup>986</sup>

In *Brown*, Sheriff B.J. Moore hired his son's nephew, Stacy Burns, despite Burns extensive "rap sheet" that included numerous violations and arrests, but no felonies. Plaintiff Brown suffered a severe knee injury when

Reserve Deputy Burns forcibly extracted her from the car driven by her husband, who had avoided a police checkpoint. She sued both Burns and the county under § 1983.<sup>987</sup>

In a 5–4 opinion by Justice O'Connor, the Court held that the violation of Brown's constitutionally protected rights was not attributable to the county's allegedly deficient process in hiring Burns. The Court distinguished Brown's claim, involving a single lawful hiring decision that ultimately resulted in a constitutional violation, from a claim that "a particular municipal action *itself* violates federal law, or directs an employee to do so."<sup>988</sup> It noted that its prior cases recognizing municipal liability based on a single act or decision by a government entity involved decisions of local legislative bodies or policy makers that ordered or otherwise directly brought about the constitutional deprivation.<sup>989</sup> The majority also rejected the Brown's effort to analogize inadequate screening to a failure to train.<sup>990</sup>

The Court ruled that Brown was required to produce evidence from which a jury could find that, had Sheriff Moore adequately screened Deputy Burns' background, Moore "should have concluded that Burns' use of excessive force would be a plainly obvious consequence of the hiring decision."<sup>991</sup> The Court found that Brown's evidence of the sheriff's scrutiny of Burns' record did not enable the jury to make such a finding.<sup>992</sup>

Justice Souter, joined by Justices Breyer and Stevens, dissented, characterizing the majority opinion as an expression of "deep skepticism" that "converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this."<sup>993</sup> Justice Breyer, joined by Justices Ginsburg and Stevens, criticized the "highly complex body of interpretive law" that has developed to maintain and perpetuate the distinction adopted in *Monell* between direct and vicarious liability, and called for a reexamination of "the legal soundness of that basic distinction itself."<sup>994</sup> Nevertheless, that distinction remains a fundamental aspect of § 1983 municipal liability law.

## VII. Pleading Municipal Liability Claims

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>995</sup> the Supreme Court in 1993 held that federal courts may not impose a heightened pleading requirement for § 1983 municipal liability claims.<sup>996</sup> The *Leatherman* decision meant that the Federal Rules of Civil Procedure notice pleading standard governed § 1983 municipal liability claims.<sup>997</sup>

In *Ashcroft v. Iqbal*,<sup>998</sup> however, the Supreme Court subsequently held that the plausibility pleading standard established in *Bell Atlantic Corp. v. Twombly*,<sup>999</sup> applies to all federal court civil complaints, thus encompassing complaints filed under § 1983.<sup>1000</sup> To comply with the *Twombly-Iqbal* standards, the complaint must allege facts and not mere legal conclusions, and these facts must constitute a “plausible,” not merely possible or speculative, claim for relief. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>1001</sup> Further, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”<sup>1002</sup> Although the Court in *Twombly* stated that it was neither requiring “detailed factual allegations” nor a “heightened fact pleading of specifics, but only enough facts to state a claim to relief plausible on its face,”<sup>1003</sup> *Twombly* and *Iqbal* appear to have imposed “plausibility” pleading standards that are more rigorous than Rule 8’s notice pleading standard.

The Court in *Twombly* and *Iqbal* did not purport to overrule *Leatherman*. However, in the author’s view, the greater likelihood is that the more recent, all encompassing *Iqbal* pleading precedent now governs the sufficiency of complaint allegations for § 1983 municipal liability claims.<sup>1004</sup>

## 12. Liability of Supervisors

In many § 1983 actions, the plaintiff seeks to impose liability not only on the officer who directly engaged in the allegedly unconstitutional conduct (e.g., a police officer) but also on a supervisory official (e.g., the chief of police). The claim against the supervisor is frequently premised upon allegations that the supervisor knew or should have known there was danger that the subordinate would engage in the unconstitutional conduct, and that the supervisor had the authority to take steps to prevent the conduct, yet failed to act. Like municipal liability, claims against supervisors normally seek to impose liability upon one party (the supervisor) for a wrong directly inflicted by another party (the subordinate). In some cases, however, a supervisor may have directly inflicted the harm or participated in doing so.

The Supreme Court, in *Ashcroft v. Iqbal*,<sup>1005</sup> held that, like § 1983 municipal liability, the liability of a supervisor under § 1983 may not be based on respondeat superior, but only on the supervisor's own wrongful acts or omissions.<sup>1006</sup> And, like municipal liability, there must be a sufficient causal link or nexus between the supervisor's wrongful conduct and the violation of the plaintiff's federally protected right.<sup>1007</sup>

However, there are important differences between the liability of a supervisor and municipal liability under § 1983:

1. The liability of a supervisor is a form of personal liability; municipal liability is a form of entity liability.<sup>1008</sup>
2. Because the liability against a supervisor imposes personal liability, supervisors may assert a common-law absolute or qualified immunity defense.<sup>1009</sup> Municipalities may not assert these immunity defenses, although municipalities sued under § 1983 are absolutely immune from punitive damages.<sup>1010</sup>
3. A municipal entity may be liable under § 1983 only when the violation of the plaintiff's federal right is attributable to the enforcement of a municipal policy or practice. By contrast, supervisory liability does not depend on a municipal policy or practice.

Prior to *Iqbal*, the courts articulated standards for the § 1983 liability of supervisors. Although these standards varied somewhat from circuit to circuit, they generally required a showing (1) that the supervisory defendant

either acquiesced in or was deliberately indifferent to the subordinate's unconstitutional conduct; and (2) that the supervisor's action or inaction was "affirmatively linked" to the deprivation of the plaintiff's federal rights.<sup>1011</sup> However, there appeared to be some disagreement as to whether the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinates' misconduct, or whether a pattern or practice of constitutional violation must be shown.<sup>1012</sup>

In any case, lower federal courts must reevaluate this circuit court authority in light of the Supreme Court's decision in *Iqbal*. *Iqbal* was a *Bivens* action, and the Court held that because there is no respondeat superior liability under § 1983 or in *Bivens* actions, a supervisor cannot be held liable for the constitutional wrongs of subordinate employees. The Court found that "supervisory liability" is a "misnomer," and that a supervisor, like any other official, may be found liable under § 1983 only on the basis of her own unconstitutional conduct. The vexing question is determining the type of conduct by a supervisor that is a proximate cause of the violation of the plaintiff's federal right.

The complaint in *Iqbal* alleged the following: "In the wake of the September 11, 2001, terrorist attacks,"<sup>1013</sup> the plaintiff, Javaid Iqbal, a citizen of Pakistan and a Muslim, was arrested by FBI and INS agents on "charges of fraud in relation to identification documents and conspiracy to defraud the United States."<sup>1014</sup> Iqbal asserted constitutional claims for damages arising out of his treatment, after being designated a "person of high interest," while detained pending trial at the Administrative Maximum Special Housing Unit at the Metropolitan Detention Center (MDC) in Brooklyn, New York. The complaint named numerous federal officers as defendants, ranging "from the correctional officers who had day-to-day contact with [Iqbal] during the term of his confinement, to the wardens of the MDC facility, all the way to" the defendants before the United States Supreme Court, John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the director of the FBI.<sup>1015</sup> Because Iqbal's claims were asserted against federal officials, they came under the *Bivens* doctrine rather than § 1983. The Supreme Court, however, made clear that the same principles governing the liability of supervisory officials for constitutional violations apply in both § 1983 and *Bivens* actions.<sup>1016</sup>

Iqbal's complaint alleged that while detained at MDC, jailers, without justification, "kicked him in the stomach, punched him in the face, and



dragged him across' his cell, . . . subjected him to serial strip and body-cavity searches . . . and refused to let him and other Muslims pray because there would be '[n]o prayers for terrorists.'"1017 Iqbal alleged that Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,' . . . that Ashcroft was the 'principal architect' of this invidious policy, and that Mueller was 'instrumental' in adopting and executing it."1018

Applying the plausibility pleading standard from *Bell Atlantic Corp. v. Twombly*,<sup>1019</sup> the Supreme Court held that the complaint did not allege facts constituting a plausible claim that the supervisory defendants adopted the alleged policy with the intent to discriminate on the basis of race, religion, and national origin. A more plausible explanation was "that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."<sup>1020</sup>

The complaint, however, also alleged a second theory for imposing liability against the supervisory defendants. Iqbal argued "that, under a theory of 'supervisory liability,' [Ashcroft and Mueller] can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.'"1021 In other words, Iqbal argued, "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."<sup>1022</sup> Interestingly, Ashcroft and Mueller conceded that they would be subject to supervisory liability if they "'had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being of 'high interest' and they were deliberately indifferent to that discrimination."1023

Nevertheless, the Supreme Court emphatically rejected this "knowledge and deliberate indifference" argument as well. Although not clearly spelled out, *Iqbal*, in fact alleged two separate theories for imposing liability against the supervisory defendants, i.e., promulgation of the alleged discriminatory policy; and knowledge and deliberate indifference. Without briefing and argument on the supervisory liability issue,<sup>1024</sup> and without referring to the extensive circuit court authority on the issue, the Court jettisoned the very concept of supervisory liability, and held that a supervisor may be found

liable under § 1983 or *Bivens* only when the supervisor herself engaged in unconstitutional conduct. In *Iqbal*, this required a showing that the supervisory defendants either adopted a policy, or directed action by a subordinate, with the alleged impermissible discriminatory intent. The Court stated that because there is no vicarious liability under § 1983 or *Bivens*,

“supervisory liability” is a misnomer. . . . [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, [discriminatory] purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.<sup>1025</sup>

Therefore, Ashcroft and Mueller “cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic.”<sup>1026</sup> The plaintiff must demonstrate that the supervisor was a constitutional wrongdoer. In the author’s view, the Court’s decision does not mean that a supervisor had to have direct contact with the plaintiff. It means, however, that the supervisor must have engaged in conduct with the requisite culpability that set the wheels in motion leading to the violation of the plaintiff’s constitutionally protected rights. So viewed, the issue requires a determination of the supervisor’s own culpability and of proximate causation. These issues are related because the more egregious the supervisor’s conduct, the more likely it will be found to be the proximate cause of the violation of the plaintiff’s rights.

Justice Souter, dissenting, articulated the severe implications of the Court’s complete rejection of supervisory liability:

Lest there be any mistake, . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* [and § 1983] supervisory liability entirely. The nature of supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects. . . . [The majority] rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which “[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment,” . . . or no supervisory liability at all. . . . In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge

of a subordinate's constitutional violation and acquiesces,. . . or where supervisors "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see"; or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate; or where the supervisor was grossly negligent.<sup>1027</sup>

To summarize, the Court in *Iqbal*, while recognizing that a supervisory official's promulgation of policy may provide a basis for imposing liability, found that the complaint did not contain factual allegations establishing a plausible claim that the supervisory defendants adopted the claimed policy with a discriminatory intent. Further, the Court rejected the notion that liability may be imposed against a supervisor based on his knowledge of and deliberately indifferent failure to prevent constitutional violations.

*Iqbal* "has generated significant debate about the continuing vitality and scope of [§ 1983] supervisory liability."<sup>1028</sup>

## 13. Relationship Between Individual and Municipal Liability

### I. Bifurcation

When § 1983 claims are brought against both a state or local official individually and a municipal entity, the district court has discretion to either bifurcate the claim or try them jointly.<sup>1029</sup> Section 1983 plaintiffs generally favor a joint trial because the plaintiff may be allowed to introduce evidence of wrongdoing by other officers or by the municipal entity, albeit with limiting instructions. Section 1983 defendants normally seek bifurcation in order to thwart this strategy.

### II. *Los Angeles v. Heller*

In *Los Angeles v. Heller*,<sup>1030</sup> the plaintiff asserted § 1983 false arrest and excessive force claims; the complaint alleged personal capacity and municipal liability claims. The Supreme Court held that a determination in the first phase that the individual officer did not violate the plaintiff's federally protected rights required dismissal of the municipal liability claim. The Court reasoned that, because the municipal liability claim was premised on the city's allegedly having adopted a policy of condoning excessive force in making arrests, the city could not be liable under § 1983 unless some official violated the plaintiff's federally protected rights under the alleged "policy."<sup>1031</sup>

#### A. Circuit Court Applications of *Heller*

Although the early post-*Heller* cases read *Heller* broadly as meaning that if the personal-capacity claim is dismissed, the municipal liability claim *must* be dismissed,<sup>1032</sup> several of the more recent decisions recognized situations in which the named subordinate defendant did not violate the plaintiff's federally protected rights, but the plaintiff's rights were violated by the joint action of a group of officers, or by a nondefendant, or by policy-making officials.<sup>1033</sup> Under these circumstances, dismissal of the claim against the individual officer-defendant should not result in automatic dismissal of the municipal liability claim.

B. Officer Protected by Qualified Immunity Does Not Necessarily Require Dismissal of Municipal Liability Claim

The fact that the plaintiff's claim against the individual officer–defendant is defeated by qualified immunity should not automatically result in dismissal against the municipality, because an officer who is protected by qualified immunity may have violated the plaintiff's federally protected rights. The qualified immunity determination may mean only that the defendant did not violate the plaintiff's *clearly established* federally protected rights.<sup>1034</sup> An official sued in his personal capacity may assert qualified immunity; a municipal entity may not.

C. Plaintiff Need Not Sue Both Officer and Municipality

There is no requirement in § 1983 law that the plaintiff sue both the officer in a personal capacity and the municipality. The plaintiff may choose to sue only the officer, or only the municipality.<sup>1035</sup> When the plaintiff does not sue both the officer and municipality, *Heller* issues do not arise.

**III. If Plaintiff Prevails on Personal-Capacity Claim**

If the plaintiff is awarded relief on her personal-capacity claim, should the district court nevertheless allow her to proceed on her municipal liability claim? The majority view is that once the plaintiff obtains complete relief on her personal-capacity claim, it is unnecessary for the court to proceed with the municipal liability claim.<sup>1036</sup> In other words, because the plaintiff achieved the objective of her suit, there is no reason to allow it to proceed further. The Second Circuit, however, held that when a plaintiff recovers only nominal damages against the officer on the personal-capacity claim, the plaintiff cannot relitigate the issue of compensatory damages for the constitutional violation against the city, but is entitled to pursue his claim for nominal damages for the constitutional violation against the city.<sup>1037</sup> The Second Circuit relied, in part, upon the societal importance of holding “a municipality accountable where official policy or custom has resulted in the deprivation of constitutional rights.”<sup>1038</sup>

**IV. “Cost Allocation Scheme”**

The interplay of the rules governing qualified immunity and municipal liability results in a cost-allocation scheme among the municipality, the in-

dividual officer, and the plaintiff whose federally protected rights were violated. The Supreme Court, in *Owen v. City of Independence*,<sup>1039</sup> explained how the “costs” are allocated:

1. The municipality will be held liable for compensatory damages when the violation of the plaintiff’s federally protected right is attributable to enforcement of a municipal policy or practice.
2. The individual officer will be held liable for compensatory damages when she violated the plaintiff’s clearly established, federally protected right and, therefore, she is not shielded by qualified immunity.
3. The plaintiff whose federally protected right was violated will not be entitled to monetary recovery, and will “absorb the loss” when the violation of her right is not attributable to the enforcement of a municipal policy or practice, and the individual officer did not violate plaintiff’s clearly established federal rights.<sup>1040</sup>

## 14. State Liability: The Eleventh Amendment

### I. Relationship Between Suable § 1983 “Person” and Eleventh Amendment Immunity

When a § 1983 claim is asserted against a state, state agency, or state official, the defendant may assert two separate yet closely related defenses, namely, that the defendant is not a suable “person” under § 1983; and that the defendant is shielded from liability by Eleventh Amendment sovereign immunity. In *Will v. Michigan Department of State Police*,<sup>1041</sup> the Supreme Court ruled that a state, a state agency, and a state official sued in her official capacity for monetary relief are not suable § 1983 “persons.” However, the Court in *Will* ruled that a state official sued in an official capacity is a suable person when sued for prospective relief.<sup>1042</sup> Further, in *Hafer v. Melo*,<sup>1043</sup> the Court held that a state official sued for damages in her personal capacity is a “suable” § 1983 person.

When the defendant asserts both “no person” and Eleventh Amendment defenses, a federal court should first determine the “no person” defense.<sup>1044</sup> Because the Supreme Court’s definition of suable person in *Will* was informed by Eleventh Amendment immunity, and because the Court’s bifurcated definition of suable person that distinguishes between retrospective and prospective relief is symmetrical with Eleventh Amendment immunity, lower federal courts must have a good working knowledge of Eleventh Amendment law. This is so even though a federal court’s resolution of the “person” issue will always, or virtually always, render it unnecessary to decide the Eleventh Amendment issue. Even where a state has waived its Eleventh Amendment immunity, it would still not be a suable § 1983 “person.”<sup>1045</sup> As explained in Part VI, substantial numbers of lower federal court § 1983 decisions continue to be based on the Eleventh Amendment.

### II. Eleventh Amendment Protects State Even When Sued by Citizen of Defendant State

Under the Eleventh Amendment, the states have immunity from suit in federal courts.<sup>1046</sup> Although the language in the Eleventh Amendment refers to a suit brought by a citizen of one state against *another* state, the

Supreme Court has long interpreted it as granting the states sovereign immunity protection even when a state is sued in federal court by one of its own citizens.<sup>1047</sup> The Court's rationale is that there is a broader state sovereign immunity underlying the Eleventh Amendment, and that this broader immunity should be read into the Eleventh Amendment.

### III. State Liability in §1983 Actions

#### A. Section 1983 Does Not Abrogate Eleventh Amendment

The Supreme Court holds that the Eleventh Amendment applies to § 1983 claims against states and state entities because, in enacting the original version of § 1983, Congress did not intend to abrogate the states' Eleventh Amendment immunity.<sup>1048</sup> Therefore, a federal court award of § 1983 monetary relief against a state, state agency, or state official sued in an official capacity is barred by the Eleventh Amendment.<sup>1049</sup>

#### B. Prospective Relief: *Ex parte Young*

Under the doctrine of *Ex parte Young*,<sup>1050</sup> prospective relief against a state official in his official capacity to prevent future federal constitutional or federal statutory violations is not barred by the Eleventh Amendment. The Court in *Young* reasoned that a state official who violated federal law is "stripped of his official or representative character" and, therefore, did not act for the state, but as an individual. Because the Eleventh Amendment protects states and state entities, and not individuals, the claim for prospective relief is not barred by the Eleventh Amendment. The rationale behind the *Young* doctrine is fictitious because its prospective relief operates in substance against the state, and may have a substantial impact on the state treasury. The *Young* doctrine "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."<sup>1051</sup>

To determine whether a plaintiff has alleged a proper *Young* claim, the federal court "need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"<sup>1052</sup> In addition, the plaintiff must name as defendant the state official responsible for enforcing the contested statute in her official capacity;<sup>1053</sup> a claim for



prospective relief against the state itself, or a state agency, will be barred by the Eleventh Amendment.<sup>1054</sup> Declaratory relief is within the *Young* doctrine's reach, but only when there are ongoing or threatened violations of federal law.<sup>1055</sup>

When a federal court grants *Young* prospective relief, it has the power to enforce that relief, including by ordering monetary sanctions payable out of the state treasury.<sup>1056</sup> Similarly, a federal court's enforcement against a state of a consent decree that is based on federal law does not violate the Eleventh Amendment.<sup>1057</sup> The rationale is that "[i]n exercising their prospective powers under *Ex Parte Young* and *Edelman v. Jordan*, federal courts are not reduced to [granting prospective relief] and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties."<sup>1058</sup>

In *Pennhurst State School & Hospital v. Halderman*,<sup>1059</sup> the Supreme Court held that the *Young* doctrine does not apply to state law claims that are pendent ("supplemental") to the § 1983 claim. Therefore, a supplemental state law claim that seeks to compel the state to comply with state law is barred by the Eleventh Amendment. The Court reasoned that the *Young* fiction was born of the necessity of federal supremacy to enable the federal courts to compel compliance by the states with federal law, a factor not present when the plaintiff claims a violation of state law.<sup>1060</sup> The Court in *Pennhurst* viewed federal court relief requiring a state to comply with its own state law as a great intrusion on state sovereignty.<sup>1061</sup>

#### IV. Personal-Capacity Claims

The Eleventh Amendment does not grant immunity when a § 1983 claim for damages is asserted against a state official in her personal capacity.<sup>1062</sup> The monetary relief awarded on such a claim would not be payable out of the state treasury, but would come from the state official's personal funds, which are not protected by the Eleventh Amendment.<sup>1063</sup> The fact that the state agreed to indemnify the state official for a personal capacity monetary judgment does not create Eleventh Amendment immunity because the decision to indemnify is a voluntary policy choice of state government; it is not compelled by mandate of the federal court.<sup>1064</sup>

## V. Municipal Liability; the Hybrid Entity Problem

The Eleventh Amendment does not protect municipalities.<sup>1065</sup> Thus, in contrast to a § 1983 federal court damage award against a state entity, a § 1983 damage award against a municipality is not barred by the Eleventh Amendment. Many governing bodies have attributes of both state and local entities. For example, an entity may receive both state and local funding, or an entity that carries out a local function may be subject to state oversight. Federal courts frequently have to determine whether such a “hybrid entity” should be treated as an arm of the state or of local government.<sup>1066</sup> In making this determination, the most important factor is whether the federal court judgment can be satisfied from state funds as opposed to municipal funds,<sup>1067</sup> because the Eleventh Amendment is designed to protect the *state* treasury. A “hybrid entity” asserting Eleventh Amendment immunity bears the burden of demonstrating that it is an arm of the state protected by Eleventh Amendment immunity.<sup>1068</sup>

In *Mt. Healthy City School District Board of Education v. Doyle*,<sup>1069</sup> the Supreme Court found that because the defendant, the school board, was more like a municipality than an arm of the state, it was not entitled to assert Eleventh Amendment immunity. Although the school board received significant state funding and was subject to some oversight from the state board of education, it also had the power to raise its own funds by issuing bonds and levying taxes, and state law did not consider the school board an arm of the state. The Court found that, “[o]n balance,” the school board was “more like a county or city than it [was] like an arm of the state.”<sup>1070</sup>

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,<sup>1071</sup> the Court followed its *Mt. Healthy* approach and adopted the presumption that an agency created pursuant to an interstate compact is not entitled to Eleventh Amendment immunity “[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose . . . .”<sup>1072</sup>

## VI. Eleventh Amendment Waivers

A state may voluntarily waive its Eleventh Amendment immunity, but these waivers are relatively rare. The Supreme Court invokes a strong presumption against Eleventh Amendment waiver, and holds that waiver will be found only if the state agrees to subject itself to liability in federal court

by “express language or . . . overwhelming [textual] implications.”<sup>1073</sup> The Court found a deliberate waiver of Eleventh Amendment immunity, however, where the state, after waiving its immunity from state law claims in state court, removed the state suit to federal court.<sup>1074</sup> The Court reasoned that it “would seem anomalous or inconsistent” for a state to invoke the judicial power of the federal court while, at the same time, asserting that the Eleventh Amendment deprived the federal court of judicial power.<sup>1075</sup>

## VII. Eleventh Amendment Appeals

In *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,<sup>1076</sup> the Supreme Court held that a district court’s denial of Eleventh Amendment immunity is immediately appealable to the court of appeals. The Court relied on the fact that the Eleventh Amendment grants states not only immunity from liability, but also “immunity from suit” and from the burdens of litigation.<sup>1077</sup> It found that an immediate appeal was necessary to vindicate this immunity as well as the states’ “dignitary interests.”<sup>1078</sup>

## 15. Personal-Capacity Claims: Absolute Immunities

### I. Absolute Versus Qualified Immunity: The Functional Approach

Despite § 1983's "broad terms," the Supreme Court "has long recognized that" officials sued for monetary relief in their personal capacities may be entitled to assert a common-law defense of absolute or qualified immunity.<sup>1079</sup> In general, the Court, applying a "functional approach," has held that judges, prosecutors, witnesses, and legislators may assert absolute immunity, while executive and administrative officials may assert qualified immunity.<sup>1080</sup> Most officials are entitled only to qualified immunity.

The Court "has looked to the common law [of 1871] for guidance in determining the scope of the immunities available in a § 1983 action" and does "not simply make [its] own judgment about the need for immunity" by making "a freewheeling policy choice."<sup>1081</sup> On the other hand, it has not applied the common-law immunities "mechanically,"<sup>1082</sup> and has considered developments in the law since 1871 as well as policy concerns underlying § 1983.<sup>1083</sup>

Under the "functional approach" adopted by the Supreme Court, an official's entitlement to absolute or qualified immunity depends on "the nature of the function performed, not the identity of the actor who performed it."<sup>1084</sup> Thus, an official may be entitled to absolute immunity for carrying out one function but only to qualified immunity for another. For example, a judge may assert absolute judicial immunity for carrying out her judicial functions, but only qualified immunity for carrying out administrative and executive functions, such as hiring and firing court employees.<sup>1085</sup> And, as discussed below, prosecutors may claim absolute prosecutorial immunity for their advocacy functions, but only qualified immunity for their investigatory and administrative functions.

Determining the nature of the function an official carried out may present difficulties. For example, the line between a prosecutor's advocacy and investigative functions is not always clear. A court may be able to avoid having to decide the type of function the defendant/official carried out if the official is protected by qualified immunity anyway because she did not violate clearly established federal law. In *Ashcroft v. al-Kidd*,<sup>1086</sup> the Supreme

Court held that former Attorney General Ashcroft was protected from liability by qualified immunity because his policy concerning enforcement of the federal material witness statute did not violate clearly established Fourth Amendment law. This determination made it unnecessary for the Court to “address the more difficult question whether [Ashcroft] enjoys absolute [prosecutorial immunity].”<sup>1087</sup>

## **II. Judicial Immunity**

### **A. Judicial Immunity Protects Judicial Acts Not in Complete Absence of All Jurisdiction**

The law has long recognized that judges carrying out their judicial functions enjoy broad absolute judicial immunity.<sup>1088</sup> This immunity is designed to allow judges to carry out their judicial functions without the fear that disappointed parties may seek to establish liability against them. A judge does not lose absolute immunity simply because he acted in excess of jurisdiction; absolute immunity is lost only when the judge either did not perform a judicial act or when the judge “acted in the clear absence of all jurisdiction.”<sup>1089</sup> A judge who acts in excess of jurisdiction, or without personal jurisdiction, or who makes grave procedural errors, or who acts “maliciously or corruptly” or “in excess of authority,” does not necessarily act in the clear absence of all jurisdiction.<sup>1090</sup> To determine whether the judge performed a “judicial act,” courts consider whether the judge engaged in action normally performed by a judge, and whether the parties dealt with the judge in her judicial capacity. (Examples of judicial and nonjudicial acts are cited in the endnote.)<sup>1091</sup>

In *Pierson v. Ray*,<sup>1092</sup> the Court held that the judicial functions of determining guilt and sentencing a criminal defendant are protected by absolute immunity.<sup>1093</sup> Judicial immunity was deemed proper for two reasons: the common law of 1871 (when the original version of § 1983 was enacted) supported it; and the policy behind § 1983 was not to deter judges from performing their jobs. The Court stated that judicial immunity

“is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence

and without fear of consequences.” It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.<sup>1094</sup>

In short, absolute immunity is necessary to protect the judicial system. The essential philosophy is that the remedy for judicial errors is an appeal, not a § 1983 lawsuit for damages.

The Supreme Court has had to define the boundaries of “judicial” actions. In *Stump v. Sparkman*,<sup>1095</sup> the Court held that Judge Harold D. Stump had performed a judicial act when he authorized a mentally retarded girl to undergo a tubal ligation at the request of her mother.<sup>1096</sup> The Court explained that absolute judicial immunity applies to actions taken by judges “in error, . . . maliciously, or . . . in excess of [their] authority,” but not in the “clear absence of all jurisdiction.”<sup>1097</sup>

Furthermore, an action can be judicial even if it lacks the formality often associated with court proceedings; the question is whether the action is one normally performed by a judge. In *Stump*, the Court recognized absolute immunity for the judge’s act of ordering a tubal ligation, even though there had been no docket number, no filing with the clerk’s office, and no notice to the minor. Similarly, in *Mireles v. Waco*,<sup>1098</sup> the Court determined that a judge performed a judicial act in ordering a bailiff to use excessive force to compel an attorney to attend court proceedings because directing officers to bring counsel to court for a pending case is a function normally performed by a judge.<sup>1099</sup> Even though judges do not have the authority to order police officers to commit battery, they have broad authority to maintain court proceedings.

A judge is protected only by qualified immunity when carrying out administrative functions. In *Forrester v. White*,<sup>1100</sup> the Supreme Court, applying the functional approach, held that when a judge fired a probation officer, he performed an administrative act, and was thus protected only by qualified immunity.<sup>1101</sup> The Court rejected the argument that judges should have absolute immunity for employment decisions because an incompetent employee can impair the judge’s ability to make sound judicial decisions. It reasoned that employment decisions made

by judges “cannot meaningfully be distinguished from” employment decisions made by district attorneys and other executive officials, and “no one claims they give rise to absolute immunity from liability in damages under § 1983.”<sup>1102</sup>

#### B. Injunctive Relief: Federal Court Improvements Act

Judicial immunity is primarily at issue when the plaintiff seeks monetary relief against a state court judge. In *Pulliam v. Allen*,<sup>1103</sup> the Supreme Court held that judicial immunity did not encompass claims for prospective relief and attorneys’ fees against a judge in her judicial capacity. The Federal Court Improvements Act of 1996 (FCIA) amended § 1983 and its attorneys’ fees provision<sup>1104</sup> to provide that injunctive relief and § 1988 fees generally may not be granted against a judicial officer “for an act or omission taken in such officer’s judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable.”<sup>1105</sup> The FCIA amended § 1988(b) to provide that attorneys’ fees may not be awarded against a judicial officer based on conduct in a judicial capacity, unless the officer’s conduct was in clear excess of the officer’s jurisdiction.

The District of Columbia Circuit Court of Appeals found that these FCIA provisions are not limited to judges, and extend “to other officers of government whose duties are related to the judicial process.”<sup>1106</sup> The court held specifically that the FCIA protected public defender program administrators’ selection of attorneys for court-appointed attorney panels in juvenile delinquency cases because the administrators acted in a judicial capacity.

#### C. Hearing Officers, Court Reporters, and Court Clerks

In some circumstances, administrative hearing officers may claim absolute quasi-judicial immunity. Whether absolute immunity is appropriate depends primarily on whether the hearing officer is politically independent, and if the hearing affords sufficient procedural safeguards to ensure that the administrative process fairly resembles the judicial process.

In *Butz v. Economou*,<sup>1107</sup> the Supreme Court held that federal hearing officers were entitled to assert absolute quasi-judicial immunity because, *inter alia*, the officers carried out a function comparable to that of trial judges. The Court also held that the hearings afforded ad-

equate procedural safeguards, and, “[m]ore importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.”<sup>1108</sup>

By contrast, in *Cleavinger v. Saxner*,<sup>1109</sup> the Supreme Court held that the defendants, prison officials, who held disciplinary hearings were not entitled to claim absolute immunity because of their lack of independence and insufficient procedural safeguards. The Court found that a committee of federal prison officials did not perform a judicial act in deciding to discipline a prisoner after a hearing. The committee members were not administrative law judges. Rather they work with the fellow employee who lodged the disciplinary charge against the inmate, and are thus under pressure to resolve the matter in favor of the prison institution and the fellow employee.<sup>1110</sup>

The Supreme Court held that court reporters may not assert absolute immunity because they do not engage in the kind of discretionary decision making or exercise of judgment protected by judicial immunity.<sup>1111</sup> Federal appellate court authority holds that judicial law clerks may claim absolute immunity “where they are performing discretionary acts of a judicial nature.”<sup>1112</sup> However, the ministerial acts of court clerks are governed by qualified immunity.<sup>1113</sup>

### III. Prosecutorial Immunity

A prosecutor is absolutely immune when acting as an advocate for the state by engaging in conduct that is “intimately associated with the judicial phase of the criminal process.”<sup>1114</sup> Supreme Court decisional law holds that “acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protection of absolute immunity.”<sup>1115</sup> Prosecutors are not absolutely immune from liability for administrative actions or investigative functions not closely related to either trial preparation or the trial process. Prosecutorial immunity does protect the prosecutor in her role as advocate even if she acted in clear violation of law,<sup>1116</sup> or even “with an improper state of mind or improper motive.”<sup>1117</sup> Further, “a prosecutor is absolutely immune from a civil conspiracy charge



when his alleged participation in the conspiracy consists of otherwise immune acts.”<sup>1118</sup>

In *Imbler v. Pachtman*,<sup>1119</sup> the Court held that a prosecutor was entitled to absolute immunity for “initiating a prosecution and in presenting the State’s case.”<sup>1120</sup> The Court found that prosecutorial immunity protected even the knowing use of false testimony at trial and deliberate suppression of exculpatory evidence.<sup>1121</sup> The Court granted absolute immunity after considering two issues: (1) the availability of immunity at common law and (2) whether absolute immunity would undermine the goals of § 1983. At common law, prosecutors had immunity from suits based on malicious prosecution and defamation. In addition, the Court reasoned that absolute prosecutorial immunity properly shields prosecutors from suits by disgruntled criminal defendants, and protects their ability to act decisively. The Court found, on the one hand, that qualified immunity would not adequately protect prosecutors and, on the other hand, that the remedies of professional self-discipline and criminal sanctions would serve as adequate checks on the broad discretion of prosecutors.<sup>1122</sup>

Prosecutors have been held absolutely immune to carry out such advocacy actions as

- deciding whether to prosecute;
- engaging in pretrial litigation activities concerning applications for arrest and search warrants, bail applications, and suppression motions;
- appointing special prosecutor;
- making decisions concerning extradition;
- preparing for trial, including interviewing witnesses and evaluating evidence;
- failing to turn over exculpatory material to defense;
- introducing evidence;
- plea bargaining;
- entering into release-dismissal agreement;
- making sentencing recommendations;
- failing to disclose exculpatory material to defense in post-conviction proceedings.<sup>1123</sup>

Prosecutors, however, may not claim absolute immunity for investigative and administrative functions not related either to trial preparation or to the trial process.<sup>1124</sup> Thus, decisional law holds that prosecutors may

assert only qualified immunity for such administrative and investigative functions as

- holding a press conference;<sup>1125</sup>
- engaging in investigative activity prior to the establishment of probable cause to arrest;<sup>1126</sup>
- providing the police with legal advice during the investigative phase;<sup>1127</sup>
- ordering police to conduct warrantless arrests;<sup>1128</sup> and
- participating in execution of material witness warrant.<sup>1129</sup>

Courts often must draw fine distinctions in determining whether the prosecutor's actions should be characterized as advocacy, or as investigative or administrative activity.<sup>1130</sup> In *Van de Kamp v. Goldstein*<sup>1131</sup> (discussed in detail *infra*), the Supreme Court held that even a prosecutor's administrative actions are protected by absolute prosecutorial immunity when they are closely related to the trial process. In *Burns v. Reed*,<sup>1132</sup> the § 1983 complaint challenged the prosecutor's (1) misleading presentation of a police officer's testimony at a probable cause hearing for the issuance of a search warrant, and (2) legal advice to police officers about the use of hypnosis as an investigative tool and the existence of probable cause to arrest the plaintiff.<sup>1133</sup> The Supreme Court held that the prosecutor had absolute immunity for his participation at the probable cause hearing,<sup>1134</sup> but only qualified immunity for his legal advice to the police.<sup>1135</sup> While the prosecutor at the probable cause hearing acted as an "advocate for the state,"<sup>1136</sup> "advising the police in the investigative phase" was too remote from the judicial process.<sup>1137</sup> Furthermore, it would be "incongruous" to afford prosecutors absolute immunity "from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."<sup>1138</sup>

In *Buckley v. Fitzsimmons*,<sup>1139</sup> the Court again stressed that absolute prosecutorial immunity applies only when the prosecutor's challenged action is sufficiently related to the judicial process. The Court held that the prosecutor did not have absolute immunity for: (1) conspiring "to manufacture false evidence that would link [the plaintiff's] boot with the boot print the murderer left on the front door," and (2) conducting a press conference defaming the plaintiff shortly before the defendant's election and the grand jury's indictment of the plaintiff.<sup>1140</sup> In neither instance did the prosecutor act as an "advocate" for the state.<sup>1141</sup>

The *Buckley* Court attempted to create a bright line for distinguishing prosecutorial acts from investigative acts by holding that a prosecutor's "advocacy" starts when he has probable cause to make an arrest.<sup>1142</sup> It blurred the line, however, by stating that the presence or absence of probable cause is not dispositive of the issue of absolute immunity because, even after a prosecutor has probable cause, he may perform investigative work protected only by qualified immunity.<sup>1143</sup> In *Buckley*, the prosecutor did not have probable cause to arrest the plaintiff before he allegedly manufactured false evidence and thus was not entitled to absolute immunity. With respect to the defamatory press conference, the Court found that even if media relations is an important part of a prosecutor's job, it is not functionally tied to the judicial process.

In *Kalina v. Fletcher*,<sup>1144</sup> however, the Court did not refer to the presence or absence of probable cause in deciding whether actions performed by a prosecutor were protected by absolute immunity. Instead, it focused on whether the prosecutor had filed sworn or unsworn pleadings. The Court held that the prosecutor had absolute immunity for filing two unsworn pleadings—an information and a motion for an arrest warrant, because these were advocacy functions—but not for the act of personally vouching for the truthfulness of facts set forth in a document called a "Certification for Determination of Probable Cause," because this was akin to the traditional function of a complaining witness. The Court refused to extend absolute immunity to the extent the prosecutor performed the function of a complaining witness because common law did not provide absolute immunity for this type of conduct.<sup>1145</sup>

In *Van de Kamp v. Goldstein*,<sup>1146</sup> the Supreme Court unanimously held that absolute prosecutorial immunity protected a District Attorney and his Chief Deputy from monetary liability on a § 1983 wrongful conviction claim based upon allegations that they failed to adequately train and supervise prosecutors in their office on their *Brady*<sup>1147</sup> obligations concerning impeachment material.

Thomas Goldstein alleged in his § 1983 complaint that the Los Angeles prosecutors' failure to disclose vital impeachment evidence caused his wrongful homicide conviction. He alleged that in 1980 he was convicted of murder:

that this conviction depended in critical part upon the testimony of Edward Floyd Fink, a jailhouse informant; that Fink's testimony was

unreliable and false; that Fink had previously received reduced sentences for providing prosecutors with favorable testimony in other cases; that at least some prosecutors in the Los Angeles County District Attorney's Office knew about the favorable treatment; that the office had not provided Goldstein's attorney with the information; and that . . . the prosecutor's failure to provide Goldstein's attorney with this potential impeachment information had led to his erroneous conviction.<sup>1148</sup>

The Court recognized that prosecutorial immunity allows prosecutors to carry out their advocacy duties independently, without looking over their shoulder fearing monetary liability, and to prevent deflection of prosecutorial energies to the defense of claims for damages.<sup>1149</sup>

*Van de Kamp* also acknowledged, however, that prosecutorial immunity does not extend to a prosecutor's conduct not intimately related to the judicial process. The Court stated:

In the years since *Imbler*, we have held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding [*Burns v. Reed*, 500 U.S. 478, 492 (1991)], or appears in court to present evidence in support of a search warrant application [*Kalina v. Fletcher*, 522 U.S. 118, 126 (1997)] . . . [but not] when a prosecutor gives advice to police during a criminal investigation, see *Burns*, *supra*, at 496, when the prosecutor makes statements to the press, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, *Kalina*, *supra*, at 132 (Scalia, J., concurring). This case, unlike these earlier cases, requires us to consider how immunity applies where a prosecutor is engaged in certain administrative activities.<sup>1150</sup>

The Court agreed with Goldstein that his claims attacked the district attorney "office's administrative procedures."<sup>1151</sup> Nevertheless, assuming that the district attorney and his chief deputy had "certain" due process "obligations as to training, supervision, or information-system management," the Court held "that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here."<sup>1152</sup> It reasoned that prosecutorial immunity was applicable because, even though the complaint attacked administrative actions, these actions were intimately connected to the criminal prosecutions against Goldstein. The Court put it this way:

Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial

constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management.<sup>1153</sup>

Further, *Van de Kamp* ruled that the fact that the defendants' general supervisory, training, and information management actions were at issue, rather than supervision of a particular prosecution, was not critical.

That difference does not preclude an intimate connection between prosecutorial activity and the trial process. The management tasks at issue ... concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties. And, in terms of *Imbler's* functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial ... and a suit charging that a supervisor trained and supervised inadequately ... would seem very much alike.<sup>1154</sup>

In other words, supervisory prosecutors, like trial prosecutors, should be able to make decisions free of the fear of personal liability.

The Court made clear that it would not allow § 1983 plaintiffs' attorneys to work an end run around prosecutorial immunity, because "[m]ost important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*."<sup>1155</sup>

The Court's rationale for applying absolute immunity to the training and supervision claims also applied to the information system claim, even if that claim was even more "purely administrative" in nature. "Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training," in that each process "requires knowledge of the law."<sup>1156</sup>

This type of information system would require courts to determine whether there is a need for an information system; if so, what kind of system; "and whether an appropriate system would have included *Giglio*-related [impeachment] information *about one particular kind of trial informant*."<sup>1157</sup> These decisions, too, are intimately associated with the judicial phase of the criminal process. "Consequently, where a § 1983 plaintiff

claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error at his or her particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself."<sup>1158</sup> The upshot of *Van de Kamp* is that characterization of a prosecutor's actions as "administrative" will not necessarily negate prosecutorial immunity.

It may be hard to determine whether a prosecutor's actions in the post-conviction stage are sufficiently related to her advocacy function to warrant absolute immunity. In *Warney v. Monroe County*,<sup>1159</sup> the Second Circuit, relying on *Van de Kamp*, held that a prosecutor's delay of more than two months during postconviction proceedings in communicating the exonerating results of DNA testing to Warney's attorney was shielded by absolute prosecutorial immunity. It noted that "the line between 'advocacy' and 'investigative' functions" is especially "vexed" in the postconviction context, with the circuits reaching apparently conflicting results.<sup>1160</sup> The court held that a prosecutor who acts as an advocate during postconviction proceedings is protected by absolute immunity because "a prosecutor defending a post-conviction petition remains the state's advocate in an adversarial proceeding that is an integral part of the criminal justice system," and postconviction proceedings often involve the same kinds of legal issues and advocacy skills as the underlying criminal case.<sup>1161</sup> It found that the prosecutor's DNA "testing, disclosure, and even the delay in making disclosure, as well as the identification of the real killer—were integral to and subsumed in the advocacy functions being performed in connection with Warney's post-conviction initiatives."<sup>1162</sup>

The decisional law thus draws some very fine distinctions between prosecutorial actions protected by absolute immunity because they resemble advocacy, and prosecutorial actions that are not protected by absolute immunity because they are investigative or administrative in nature and not sufficiently related to trial preparation, or the trial process. A useful rule of thumb is that "[t]he more distant a function is from the judicial process, the less likely absolute immunity will attach."<sup>1163</sup>

*Social Workers.* There has been substantial litigation concerning the immunity protections of social workers involved in child neglect and dependency proceedings. Courts hold that social workers who initiate, testify, or otherwise participate in the judicial aspects of these proceedings are, under the functional approach, protected by absolute immunity, while

social workers engaged in executive or administrative actions may assert qualified immunity.<sup>1164</sup> As a general observation, when qualified immunity applies, the courts typically engage in a fact-specific evaluation of the reasonableness of the social worker's actions.

#### **IV. Witness Immunity**

In *Briscoe v. LaHue*,<sup>1165</sup> the Supreme Court held that witnesses, including police officers who testify in judicial proceedings, are protected by absolute immunity, even if the witness gave perjured testimony. It reasoned that denying absolute immunity might make some witnesses reluctant to testify or cause them to distort their testimony for fear of liability.<sup>1166</sup> "Subjecting . . . police officers to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties."<sup>1167</sup>

In *Rehberg v. Paulk*,<sup>1168</sup> the Supreme Court extended *Briscoe*'s absolute witness immunity for trial testimony to witnesses who testify before the grand jury. It found that the same justifications for granting absolute immunity for trial witnesses apply to grand jury witnesses. "In both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony," because in each instance perjury is subject to criminal prosecution.<sup>1169</sup>

*Rehberg* also held that absolute immunity protects alleged conspiracies to give perjured testimony and witness preparation.<sup>1170</sup> The Court reasoned that were the rule "otherwise, 'a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.'"<sup>1171</sup> In fact, in the "vast majority" of claims against grand jury witnesses, the witness and prosecutor engaged in preparatory activity, such as preliminary discussions in which the witness revealed the substance of her intended testimony. The Court was concerned that failure to immunize an alleged conspiracy to give false testimony and trial preparation would make it easy for § 1983 claimants to evade absolute witness immunity.<sup>1172</sup> The Court, however, cautioned that it was not holding or suggesting that absolute immunity extends to all of the officer's pretestimony activity.<sup>1173</sup>

The Court in *Rehberg* acknowledged that its precedent supported the conclusion that law enforcement officials who submitted affidavits in sup-

port of applications for arrest warrants were not entitled to absolute immunity because they were “*complaining* witnesses.” Prior to *Rehberg*, however, the Court had never provided a workable definition of “complaining witness.” *Rehberg* resolved that a grand jury witness is not a “complaining witness.”<sup>1174</sup> At common law in 1871 a “complaining witness” referred to an individual who procured an arrest and initiated a criminal prosecution.<sup>1175</sup> A witness who only testified before a grand jury was not considered a complaining witness. In fact, the term is a misnomer because a complaining witness need not testify at all.<sup>1176</sup> The Court found that the plaintiff in *Rehberg* failed to provide a “workable standard” for determining whether a particular grand jury witness is a “complaining witness,” and held that merely testifying before the grand jury or at trial does not render the witness a complaining witness. Although a law enforcement officer who testifies before the grand jury may be an important witness who wants the grand jury to return an indictment, in fact it is almost always a prosecutor, not a grand jury witness, who decides to present the case to the grand jury.<sup>1177</sup>

Most states that do not use the grand jury system provide a preliminary hearing. The Court in *Rehberg* cited, with apparent approval, appellate decisions holding that witnesses at a preliminary hearing are entitled to the same immunity granted grand jury witnesses.<sup>1178</sup>

*Rehberg* does not resolve the issue of immunity to which other witnesses are entitled—for example, witnesses in civil litigation, before administrative agencies, and in arbitration proceedings.<sup>1179</sup> One reason these issues do not arise with great frequency in § 1983 litigation is because a § 1983 defendant must have acted under color of state law. Law enforcement officers who testify pursuant to their official responsibilities clearly act under color of state law. Private witnesses clearly do not, unless they conspired with a public official.

To summarize the critical rulings in *Rehberg*:

- grand jury witnesses are protected by absolute witness immunity;
- absolute witness immunity shields not only the testimony itself, but also an alleged conspiracy to give false testimony and trial preparation;
- via strong dictum, witnesses who testify at preliminary hearings are shielded by absolute witness immunity; and



- although “complaining witnesses” do not enjoy absolute immunity, merely testifying before the grand jury does not render the witness a “complaining witness.”

## **V. Legislative Immunity**

State and local legislators enjoy absolute immunity for their legislative acts.<sup>1180</sup> Under the functional approach to immunity, the critical issue is whether the official was engaged in legislative activity.<sup>1181</sup> The determination of an act’s legislative or executive character “turns on the nature of the act, rather than on the motive or intent of the official performing it.”<sup>1182</sup> Legislative action involves the formulation of policy, whereas executive action enforces and applies the policy in particular circumstances.<sup>1183</sup>

In *Bogan v. Scott-Harris*,<sup>1184</sup> the Supreme Court held that local legislators are entitled to absolute immunity for their legislative activities.<sup>1185</sup> The common law afforded local legislators absolute immunity and, under the functional approach, local legislators are engaged in the same types of activities as their state counterparts. The Court thus unanimously extended absolute immunity to a city council member and mayor whose challenged actions were promulgating a new city budget and signing a law that eliminated the plaintiff’s position after she complained about racial epithets in the workplace.

The decision in *Bogan* demonstrates (1) that an official who is not a legislative official, such as the mayor, may be protected by absolute legislative immunity if her conduct was an integral step in the legislative process;<sup>1186</sup> and (2) that an official who engages in legislative action may be protected by absolute immunity even if the legislative acts affected only one individual.<sup>1187</sup>

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,<sup>1188</sup> the Supreme Court determined that a decision by the Tahoe Regional Planning Agency (TRPA) regarding land use was a legislative act. TRPA was an agency created by the states of California and Nevada, with the approval of Congress, for the purpose of creating a regional plan for “land use, transportation, conservation, recreation, and public services.”<sup>1189</sup> The Court held that absolute immunity applied to “the [individual] members of the TRPA acting in a legislative capacity,” even though there was no common-law immunity for such an entity, and even though all the members of the agency were appointed, not elected.

In *Supreme Court of Virginia v. Consumers Union of the United States*,<sup>1190</sup> the Supreme Court determined that the justices of the Supreme Court of Virginia performed a legislative act in promulgating professional responsibility rules for attorneys.<sup>1191</sup> The Court stated that the Virginia court had exercised “the State’s entire legislative power with respect to regulating the Bar, and its members are the State’s legislators for the purpose of issuing” the rules.<sup>1192</sup> By focusing on the action performed, not the job description of the actor, the Court emphasized the functional nature of absolute immunity.

Unlike most common-law immunity, legislative immunity is not limited to monetary relief; it also encompasses injunctive and declaratory relief.<sup>1193</sup> The rationale is that claims for injunctive and declaratory relief may divert legislative officials from their legislative function, and delay and disrupt the legislative process.<sup>1194</sup>

## 16. Personal Liability: Qualified Immunity

### I. Generally

Qualified immunity may well be the most important issue in § 1983 litigation. It is certainly the most important defense, and is frequently asserted as a defense to § 1983 personal-capacity claims for damages.<sup>1195</sup> Furthermore, courts decide a high percentage of § 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity. The Supreme Court holds that qualified immunity is not just immunity from liability, but also “immunity from suit,” that is, from the burdens of having to defend the litigation.<sup>1196</sup>

Qualified immunity protects an executive official who violated the plaintiff’s federally protected right so long as the official did not violate *clearly established* federal law. Therefore, when qualified immunity is asserted as a defense, the critical issue is whether the defendant/official violated federal law that was clearly established at the time she acted.<sup>1197</sup> When, as is often the case, the § 1983 plaintiff alleges multiple constitutional claims against multiple defendants who have asserted qualified immunity, the district court must analyze the immunity defense for each claim and each defendant, and not lump the various claims and defendants together.<sup>1198</sup> That an official may have violated clearly established *state* law is generally irrelevant to the qualified immunity defense.<sup>1199</sup>

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>1200</sup> It is designed to allow government officers to make reasonable though “mistaken judgments about open legal questions. [I]t protects ‘all but the plainly incompetent or those who knowingly violate the law.’”<sup>1201</sup> Its “basic thrust” . . . is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery,’ because the demands of litigation can seriously divert officials from their official responsibilities.<sup>1202</sup>

Qualified immunity protects officials who acted in an objectively reasonable manner. An official who violated clearly established federal law did not act in an objectively reasonable manner, while an official who violated

federal law, but not clearly established federal law, did act in an objectively reasonable manner.<sup>1203</sup> The official's subjective motivation is irrelevant to the qualified immunity defense, but may be relevant to the constitutional claim asserted.<sup>1204</sup> On the other hand, the information known to the officer when she reacted is often pertinent in determining whether she violated clearly established federal law.<sup>1205</sup>

The Supreme Court has described the qualified immunity test as a “fair warning” standard—that is, if the federal law was clearly established, the official is on notice that violation of the federal law may lead to personal monetary liability.<sup>1206</sup> Under qualified immunity, public officials “are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”<sup>1207</sup>

#### A. Mistakes of Law and Fact

In *Saucier v. Katz*,<sup>1208</sup> the Supreme Court emphasized that qualified immunity protects an officer's reasonable mistakes about what the law requires. It explained that the purpose of qualified immunity is to protect officers who make reasonable mistakes of law, not mistakes of fact.

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to legal constraints as to particular police conduct. It is sometimes difficult for an officer to determine how the relevant doctrine, here excessive force, would apply to factual situations the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in the circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.<sup>1209</sup>

On the other hand, under the Fourth Amendment, officers who have a “reasonable but mistaken belief as to the facts” (e.g., facts relevant to the question of probable cause) will not be found to have violated the Constitution.<sup>1210</sup> Similarly, “if an officer reasonably, but mistakenly believed that a suspect was likely to fight back, for instance, the officer would be justified [under the Fourth Amendment] from using more force than in fact was needed.”<sup>1211</sup> In other words, reasonable mistakes of fact are relevant to the constitutional merits, while reasonable mistakes of law are relevant on qualified immunity.<sup>1212</sup> Nevertheless, some justices have stated that “qualified immunity applies regardless of

whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"<sup>1213</sup>

B. Advice of Counsel; Supervisor's Order; Action Pursuant to Statute or Ordinance

The courts of appeals agree that, although an officer's acting on advice of counsel or pursuant to a supervisor's orders or approval will not *itself* protect an official who violated clearly established federal law, these are pertinent considerations for determining whether the official acted in an objectively reasonable manner. The courts of appeals disagree, however, over how much weight to give these factors.<sup>1214</sup>

In *Messerschmidt v. Millender*,<sup>1215</sup> the Supreme Court, holding that police officers who sought and executed a search warrant of the home were protected by qualified immunity, took into account the facts that they sought and obtained approval from a supervisor and a deputy district attorney. The Court ruled that

the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause.<sup>1216</sup>

The Court spelled out that "[t]he fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause."<sup>1217</sup> The Court did not spell out how much weight should be accorded to the securing of approvals from superiors in the qualified immunity analysis. As noted earlier, the courts of appeals have been in conflict on this issue.

The circuits also disagreed about the significance of a defendant/officer having acted pursuant to a superior's order.<sup>1218</sup> In the author's view, under *Messerschmidt* this would be pertinent, although how much weight it should be accorded is uncertain.

## II. Who May Assert Qualified Immunity? Private Party State Actors

State and local officials who carry out executive and administrative functions may assert qualified immunity.<sup>1219</sup> So far the Supreme Court has not allowed private party state actors to assert qualified immunity. In *Richard-*

*son v. McKnight*,<sup>1220</sup> the Court held that private prison guards are not entitled to assert qualified immunity. In *Wyatt v. Cole*,<sup>1221</sup> the Court held that a creditor who used a state replevin procedure could not assert qualified immunity. In both cases, however, the Court left open whether the defendants were entitled to assert a good-faith defense. Some lower courts have allowed a private party state actor defendant to assert a good-faith defense that implicates the defendant's subjective intent.<sup>1222</sup>

*Richardson* and *Wyatt* also left open whether private party state actors who carry out public functions, such as mental evaluations or civil commitments, may assert qualified immunity.<sup>1223</sup> An important factor may be whether the defendant acted under government supervision. In *Richardson*, the Court regarded the limited direct government supervision of the private prison guards as an important factor justifying denial of the right to assert qualified immunity.<sup>1224</sup>

In *Filarsky v. Delia*,<sup>1225</sup> the Supreme Court held that a private attorney hired by the city of Rialto, California, was entitled to assert qualified immunity from § 1983.<sup>1226</sup> Steve Filarsky had been hired to conduct an investigation concerning an employment dispute between the city and a city firefighter. In holding that Filarsky was entitled to assert qualified immunity, the Court relied, in part, upon the facts that in 1871 many governmental functions, including law enforcement functions, were carried out by a mixture of public employees and private individuals, and the common-law immunities did not distinguish between these governmental officials and private individuals.<sup>1227</sup> In other words, the private individuals were accorded the same immunity as public officers.

As a policy matter, the Court in *Filarsky* found that whether a person carrying out a governmental function is a full- or part-time government employee, or a private party retained by the government for a particular purpose, affording the individual immunity furthers the government's interests in attracting talented individuals, and in allowing them to carry out their official responsibilities without fear of liability and without distractions of ongoing lawsuits.<sup>1228</sup>

The Court in *Filarsky* found its earlier decisions in *Wyatt* and *Richardson* distinguishable. Whereas attorney Filarsky was hired by the city to carry out a governmental investigation, the creditors in *Wyatt* who invoked the state replevin statute pursued merely private ends and carried out no governmental responsibilities. The Court in *Filarsky* found *Richardson* to

be based on two notions: (1) that private market forces ensured that the prison guards would not perform their public duties with unwarranted timidity, and (2) that the guards functioned with only limited direct governmental supervision.<sup>1229</sup> Post-*Filarsky* appellate decisions are cited in the endnote.<sup>1230</sup>

### III. Clearly Established Federal Law

Normally, a controlling precedent of the Supreme Court, the particular circuit, or the highest court in the state is necessary to clearly establish federal law.<sup>1231</sup> The right must be clearly established in a fairly

particularized . . . sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.<sup>1232</sup>

For federal law to be clearly established, there must be fairly close factual correspondence between the prior precedents and the case at hand.<sup>1233</sup> Federal law is less likely to be clearly established when it depends on an ad hoc balancing of competing interests between the state and the individual.<sup>1234</sup> Decisions from outside the controlling jurisdiction do not clearly establish federal law absent “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”<sup>1235</sup> In some cases, the federal law might be clearly established even in the absence of controlling precedent. For example, the type of conduct engaged in by the defendant may be so obviously unconstitutional that there was no need to litigate the issue previously.<sup>1236</sup> On the other hand, a conflict in the lower courts is a strong indicator that federal law was not clearly established.<sup>1237</sup> “If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”<sup>1238</sup>

#### A. *Hope v. Pelzer*

In *Hope v. Pelzer*,<sup>1239</sup> the Court held that, under the particular circumstances, the defendants’ (state prison officials) act of cuffing an inmate to a hitching post for a lengthy period of time while shirtless in the hot Alabama sun violated clearly established Eighth Amendment stan-

dards. It found that the Eleventh Circuit had erred in applying a rigid rule that for the federal law to be clearly established the facts of the existing precedent must be “materially similar” to the facts of the instant case. “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>1240</sup> The Court found that the defendants in *Hope* had fair warning that their conduct was unconstitutional from Eleventh Circuit precedent (although not factually “on all fours”); a regulation of the state Department of Corrections relating to use of the hitching post (the regulation had been ignored by prison officials); and a Department of Justice (DOJ) transmittal to the state Department of Corrections advising it that its use of the hitching post was unconstitutional. The Supreme Court relied on this last factor, even though the record did not show that DOJ’s position had been communicated to the state prison officials.<sup>1241</sup>

In *Ashcroft v. al-Kidd*,<sup>1242</sup> the Supreme Court articulated several important principles for determining whether the federal law was clearly established when the defendant acted.

1. Law can be clearly established even though there is no “case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”<sup>1243</sup>
2. Broad constitutional principles cannot clearly establish federal law. The Supreme Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.”<sup>1244</sup>
3. Dictum in a federal district court opinion did not clearly establish the federal law, even though the footnote referred specifically to the defendant, *Ashcroft*.<sup>1245</sup> “Even a district judge’s *ipse dixit* of a holding is not ‘controlling authority’ in any jurisdiction, much less, in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust ‘consensus of cases of persuasive authority.’”<sup>1246</sup>
4. The fact that eight judges of the Ninth Circuit, who dissented from denial of en banc review, agreed with *Ashcroft*’s position



further supported the conclusion that the pertinent federal law was not clearly established.<sup>1247</sup>

In some cases, Supreme Court justices themselves have disagreed about whether the federal law was clearly established. In *Safford Unified School District # 1 v. Redding*,<sup>1248</sup> eight justices concluded that the school officials' (defendants') strip search of a thirteen-year-old student for ibuprofen violated the Fourth Amendment. However, six justices (Justice Souter, joined by C.J. Roberts, Justices Scalia, Kennedy, Breyer, and Alito) held that the Fourth Amendment law was not clearly established at the time of the search. Two justices (Justices Stevens and Ginsburg) found that the Fourth Amendment law was clearly established, and one justice (Justice Thomas) found that there was no Fourth Amendment violation. Writing for the Court, Justice Souter stated that federal law can be clearly established even in the absence of controlling precedent because, as Judge Posner stated, the "easiest cases" do not always arise.<sup>1249</sup> "But even as to action less than an outrage, 'officials can still be on notice that their conduct violates established [federal] law . . . in novel factual circumstances.'"<sup>1250</sup> Here, however, differences of opinion among courts of appeals judges around the country, as well as differences between the circuit authority and the Supreme Court's Fourth Amendment decision, were "substantial enough to require immunity for the school officials in this case. . . . [C]ases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law."<sup>1251</sup> The Court cautioned, however, that entitlement to qualified immunity is not always "the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear."<sup>1252</sup>

In evaluating a qualified immunity defense, federal judges may well disagree over which body of law to take into account; which facts are pertinent; the necessary factual correspondence between the case at hand and the pertinent precedents; and whether the law defined and established the right at issue with sufficient clarity. For example, in *al-Kidd*, the Ninth Circuit held that former Attorney General Ashcroft's material witness policy violated clearly established Fourth Amendment

law, but the Supreme Court disagreed, and held Ashcroft protected by qualified immunity.

B. Application of Qualified Immunity to Fourth Amendment Claims

The qualified immunity “objective reasonableness” defense applies even to Fourth Amendment challenges to arrests, searches, and uses of force where the constitutional standard itself is objective reasonableness.<sup>1253</sup>

In *Malley v. Briggs*,<sup>1254</sup> the Court held that police officers who executed an invalid arrest warrant may nevertheless assert the defense of qualified immunity.<sup>1255</sup> The Court recognized two standards of reasonableness—one under the Fourth Amendment and one under qualified immunity—and that conduct unreasonable under the Fourth Amendment could still be objectively reasonable for the purpose of qualified immunity.<sup>1256</sup> It noted that it had similarly recognized two standards of reasonableness when creating the objective good-faith exception to the exclusionary rule.<sup>1257</sup> Under that good-faith exception, even if officers obtained evidence by committing an unreasonable search or seizure in violation of the Fourth Amendment, the evidence could nevertheless be introduced in the prosecutor’s case-in-chief if the officers acted in “objective” good-faith reliance on a search warrant. The “objective good-faith” standard asks whether a “reasonably well-trained officer” with a “reasonable knowledge of what the law prohibits” would have known that the challenged action violated the Fourth Amendment.<sup>1258</sup>

The Court, in *Messerschmidt v. Millender*,<sup>1259</sup> refined and applied *Malley* to police officers who applied for and executed an overbroad warrant to search a home for guns and gang-related material. It held that, assuming *arguendo* that the warrant should not have been issued, the officers were protected by qualified immunity because they acted in an objectively reasonable manner.

The fact that a neutral magistrate issued the warrant was “the clearest indication that the officers acted in an objectively reasonable manner. . . .”<sup>1260</sup> This is not to say that a neutral magistrate’s issuance of a warrant is dispositive of qualified immunity. Police officers will not be protected by qualified immunity when “‘it is obvious that no reasonably competent officer would have concluded that a warrant should issue,’”<sup>1261</sup> as, “for example, where the warrant was ‘based on an affidavit so lacking in indicia of probable cause as to render official belief in its

existence entirely unreasonable.”<sup>1262</sup> But this was not the case in *Messerschmidt* because, although “[t]he officers’ judgment that the scope of the warrant was supported by probable cause may have been mistaken, . . . it was not ‘plainly incompetent.’”<sup>1263</sup> Only in “rare” circumstances will it be found that “the magistrate so obviously erred that any reasonable officer would have recognized the error.”<sup>1264</sup>

The Court also gave weight to the fact that the defendant–officers sought and obtained approval from a superior and a deputy district attorney. This was “certainly pertinent” and provided “further support” that the officers reasonably believed that the warrant was supported by probable cause.<sup>1265</sup>

In *Anderson v. Creighton*,<sup>1266</sup> the Supreme Court affirmed this dual standard of reasonableness in holding that police officers could assert qualified immunity for a warrantless search of the plaintiff’s home. The Court conceded that the general principles of the Fourth Amendment are clear: a warrantless search of an individual’s home, absent probable cause and exigent circumstances, is unreasonable.<sup>1267</sup> It explained, however, that these general principles did not determine whether the officers were protected by qualified immunity. Whether the officers violated “clearly established” law requires consideration of whether the “contours of the right [were] sufficiently clear that a reasonable official would understand that what he [did] violate[d] that right.”<sup>1268</sup>

*Anderson* established that a police officer may “reasonably, but mistakenly, conclude that probable cause is present.”<sup>1269</sup> Similarly, a police officer may reasonably but mistakenly conclude that exigent circumstances exist.<sup>1270</sup> If there is a “legitimate question” as to the unlawfulness of the conduct, qualified immunity protects the officer.<sup>1271</sup> Furthermore, “the very action in question [need not have] been previously held unlawful,” but if “in the light of preexisting law the unlawfulness [was] apparent,” then qualified immunity does not apply.<sup>1272</sup>

Similarly, in *Saucier v. Katz*,<sup>1273</sup> the Supreme Court held that the qualified immunity “objective reasonableness” test applies to Fourth Amendment “excessive force” arrest claims that are governed by the *Graham v. Connor*.<sup>1274</sup> “objective reasonableness” standard.<sup>1275</sup> It ruled that the pertinent qualified immunity inquiry is whether the officer reasonably, though mistakenly, believed that his use of force complied

with the Fourth Amendment; i.e., whether he made a reasonable mistake about the state of the law.

Applying qualified immunity to Fourth Amendment constitutional claims governed by an objective reasonableness standard gives the official two layers of reasonableness protection: one under the Fourth Amendment itself, and another under qualified immunity. This can lead to the awkward conclusion that an official acted in a reasonable manner for immunity purposes though unreasonably for constitutional purposes.<sup>1276</sup> Courts typically try to avoid this linguistic awkwardness of an official acting “reasonably unreasonably” in arrest and search cases by asking whether the official had *arguable* probable cause, or whether the officer reasonably believed there was probable cause, or whether a reasonable officer could have mistakenly concluded there was probable cause.<sup>1277</sup> So, too, in Fourth Amendment excessive force cases, courts inquire whether the officer reasonably, though mistakenly, believed that his use of force was constitutional.<sup>1278</sup>

#### C. Intent or Motive as Element of Constitutional Claims

There is potential tension between a constitutional claim that implicates the defendant’s subjective intent (such as a free speech retaliation claim) and qualified immunity, under which the defendant’s subjective intent is irrelevant. The Supreme Court, in *Crawford-El v. Britton*,<sup>1279</sup> held that when the constitutional claim implicates the defendant/official’s subjective intent, the lower courts should follow the Federal Rules of Civil Procedure and not place special burdens on plaintiffs who are faced with summary judgment qualified immunity motions. The Court said that the federal courts should not rewrite the Federal Rules of Civil Procedure; that placing unduly harsh burdens on plaintiffs may rob meritorious claims of their fair day in court; and that existing pleading, motion, and discovery rules, and the Prison Litigation Reform Act, adequately protect defendants against insubstantial constitutional claims.<sup>1280</sup>

### IV. Procedural Aspects of Qualified Immunity

#### A. Affirmative Defense; Waiver

Qualified immunity is an affirmative defense that the defendant has the burden of pleading.<sup>1281</sup> Although failure to raise qualified immunity can

operate to waive the defense, federal courts have generally been reluctant to find the defense waived.<sup>1282</sup>

## B. Complaint Pleading Standard

In *Ashcroft v. Iqbal*,<sup>1283</sup> the Supreme Court held that all federal court civil complaints are governed by the “plausibility” standard previously articulated in *Bell Atlantic Corp. v. Twombly*.<sup>1284</sup> The defendants in *Iqbal* had “moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct.”<sup>1285</sup> In determining that the defendants were entitled to dismissal of the complaint because it did not allege a plausible claim that the defendants before the Supreme Court violated clearly established federal law, the Court effectively resolved that the plausibility standard governs § 1983 and *Bivens* claims subject to qualified immunity.<sup>1286</sup>

Prior to *Iqbal*, it was uncertain whether claims subject to qualified immunity are governed by a “heightened” pleading standard. The Court in *Iqbal*, however, did not even discuss the possibility that the plaintiff’s claims were subject to a “heightened” pleading standard. In fact, in *Twombly* the Court stated specifically that the plausibility standard is not a “heightened” pleading standard. Nevertheless, *Twombly-Iqbal* requires that § 1983 complaints allege facts, not mere conclusions, and that these facts constitute a plausible, not merely possible or speculative, claim for relief. The Court in *Iqbal* stressed that “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”<sup>1287</sup> When the motion to dismiss is based on qualified immunity, as it was in *Iqbal*, the district court must determine whether the complaint alleges sufficient facts constituting a plausible claim that the defendant violated clearly established federal law. Whether the complaint alleges a plausible claim is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>1288</sup>

The Court in *Iqbal* reiterated a key point articulated in *Twombly* “that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.”<sup>1289</sup> The Court said that “rejection of the careful-case-management approach is especially important in suits where Government-offi-

cial defendants are entitled to assert the defense of qualified immunity,” because qualified immunity is designed to “free officials” from the demands of litigation, including “disruptive discovery,” which substantially diverts officials from their official responsibilities.<sup>1290</sup>

### C. Burden of Persuasion

The courts of appeals differ on the burden of persuasion for qualified immunity. The prevailing view is that once the defendant properly raises the defense of qualified immunity, the plaintiff has the burden of overcoming the immunity by showing that the defendant violated the plaintiff’s clearly established federal right.<sup>1291</sup> However, the Second Circuit places the burden of persuasion on the defendant.<sup>1292</sup>

### D. Motions to Dismiss, for Summary Judgment, and Judgment as Matter of Law

#### 1. In General

Qualified immunity is normally raised on a motion for summary judgment, sometimes on a motion to dismiss, and sometimes on a Rule 50 motion for judgment as a matter of law.<sup>1293</sup> In addition, courts may consider renewed motions for qualified immunity. These motions may occur after the plaintiff has presented her case, at the close of both sides, after the jury’s special verdict, or in a motion for a new trial.<sup>1294</sup> Resolution of qualified immunity is possible during these trial stages if the defendant is entitled to judgment as a matter of law.

#### 2. Motion to Dismiss

Qualified immunity may be raised on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted.<sup>1295</sup> On a Rule 12(b)(6) motion, the district court assumes the plaintiff’s factual allegations are true and determines whether the allegations state a plausible claim that the defendant violated clearly established federal law.<sup>1296</sup> A Rule 12(b)(6) motion based on qualified immunity should be granted unless the complaint states facts showing a plausible claim that the defendant violated the plaintiff’s clearly established federal right.<sup>1297</sup>

### 3. Summary Judgment Motions Before and After Discovery; Discovery on Disputed Factual Issues

The Supreme Court's goal in defining qualified immunity in wholly objective terms is to enable the district courts to resolve qualified immunity, to the greatest extent possible, as a matter of law, pretrial and even pre-discovery.<sup>1298</sup> In *Hunter v. Bryant*,<sup>1299</sup> the Court held that qualified "[i]mmunity *ordinarily* should be decided by the court long before trial."<sup>1300</sup> The Court criticized the lower court for "routinely plac[ing] [qualified] immunity in the hands of the jury."<sup>1301</sup>

Officials sued under § 1983 may raise the qualified immunity defense on summary judgment motion under Federal Rule of Civil Procedure 56(c) both before<sup>1302</sup> and after discovery.<sup>1303</sup> Under Rule 56(c), summary judgment is permitted if there are no disputed material facts, and the defendant is entitled to judgment as a matter of law.<sup>1304</sup>

Summary judgment qualified immunity motions before discovery may be appropriate in some circumstances because qualified immunity is not only a defense to liability but also an "immunity from suit."<sup>1305</sup> Under *Harlow v. Fitzgerald*,<sup>1306</sup> discovery should not be allowed unless the plaintiff alleged a violation of clearly established federal law. If, however, the plaintiff has alleged a violation of clearly established federal law, and the defendant alleges actions that a reasonable officer could have thought were lawful, then courts must grant discovery tailored to the immunity question.<sup>1307</sup>

When responding to a summary judgment motion based on qualified immunity, a plaintiff seeking discovery must file an affidavit with a Rule 56(f) motion demonstrating "how discovery will enable [him] to rebut a defendant's showing of objective reasonableness or . . . demonstrate a connection between the information he would seek in discovery and the validity of the defendant's qualified immunity assertion."<sup>1308</sup>

In *Crawford-El v. Britton*,<sup>1309</sup> the Supreme Court described various options that the district court can invoke when facts concerning the defendant's alleged retaliatory motive are in dispute:

1. allow the plaintiff to take a "focused deposition" of the defendant on the issue of retaliatory motive;

2. allow discovery only on “historical facts” before allowing discovery on the defendant’s motive; and
3. order the plaintiff to file a reply, or grant the defendant’s motion for a more definite statement requiring specific factual allegations of the defendant’s conduct and motive before allowing any discovery.<sup>1310</sup>

Under Federal Rule of Civil Procedure 26, district courts may limit the number of depositions and interrogatories, the length of depositions, the “time, place, and manner of discovery,” and the sequence of discovery.<sup>1311</sup> District courts may also limit discovery to an issue that may resolve the lawsuit before allowing discovery as to an official’s intent. For example, an official “may move for partial summary judgment on objective issues that are potentially dispositive and are more amenable to summary disposition than disputes about the official’s intent, which frequently turn on credibility assessments.”<sup>1312</sup> In contrast, Federal Rule of Civil Procedure 56(f) gives district courts discretion to postpone deciding an official’s motion for summary judgment if discovery is necessary to establish “facts essential to justify the [plaintiff’s] opposition.”<sup>1313</sup>

In addition, district courts can safeguard officials’ right to be free from frivolous lawsuits by imposing sanctions under Federal Rule of Civil Procedure 11, or granting dismissal under § 1915(e)(2), which permits dismissal of “frivolous or malicious” in forma pauperis suits.<sup>1314</sup> In short, district courts have “broad discretion in the management of the factfinding process.”<sup>1315</sup>

Although material facts are disputed in many cases in which qualified immunity is asserted, summary judgment may be granted to the defendant official if, interpreting the facts in the light most favorable to the plaintiff, the district court determines that these facts do not state a violation of clearly established federal law.<sup>1316</sup> In *Tolan v. Cotton*,<sup>1317</sup> the Supreme Court stressed that, on a defendant official’s summary judgment qualified immunity motion, a federal court (1) may not resolve genuine issues of disputed fact in the favor of the defendant; and (2) must view the facts in the light most favorable to the non-moving party, that is, the plaintiff. The Court noted that these rules are not unique to qualified immunity, and reflect generally applicable summary judgment principles. As an exception to these



principles, the Court, in *Scott v. Harris*,<sup>1318</sup> held that when the defendant, on summary judgment, proffers a videotape of the incident which contradicts the plaintiff's version of the incident, and there is no claim that the videotape has been doctored or fails to accurately depict the incident in question, the videotape will control over the plaintiff's version.

If the district court grants summary judgment to the defendant on the basis of qualified immunity, the immunity defense relieves officials from the burdens of trial, protecting their "immunity from suit."<sup>1319</sup> If, however, the facts as interpreted in the light most favorable to the plaintiff indicate a violation of clearly established federal law, and the discovery indicates material facts are in dispute, then summary judgment is not possible. At this point, the "immunity from suit" is lost and the case must go to trial.

In *Ortiz v. Jordan*,<sup>1320</sup> the Supreme Court held that when the defendant's summary judgment qualified immunity motion is denied and the case proceeds to trial, and the defendant continues to assert qualified immunity, qualified immunity must be evaluated based upon the evidence submitted at trial, rather than on the summary judgment evidence. Therefore, on the defendant's appeal from a judgment on a verdict for the plaintiff, the defendant may not argue that the district court erred in denying her summary judgment qualified immunity motion. Rather, in these circumstances, qualified immunity must be evaluated on the basis of the trial evidence. However, to preserve qualified immunity post-verdict, the defendant must move for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Because the defendants in *Ortiz* failed to make such a motion, they were not allowed to argue on appeal that they were entitled to qualified immunity based on the trial evidence. The Court did not decide whether the result would be different if the qualified immunity defense raised a pure question of law, namely, whether, based upon undisputed facts, the defendant/official violated clearly established federal law.

#### E. Role of Judge and Jury

Supreme Court decisions state that, whenever possible, the issue of qualified immunity should be decided pretrial and even prediscovery,

normally on a motion for summary judgment.<sup>1321</sup> When qualified immunity cannot be decided on a motion for summary judgment because facts relevant to qualified immunity are in dispute, the district court has two major options. It may be proper for the district court to submit the factual issues and the immunity defense to the jury under instructions that (1) tell the jury what the clearly established federal law is, and (2) describe the nature of qualified immunity; or, alternatively, submit the factual issues that are material to qualified immunity to the jury by special verdicts, while reserving for itself the power to determine the immunity defense in light of the jury's responses to the special verdicts. Most courts have chosen the second option because it seems to best reflect the jury's function as fact-finder and the court's expertise in determining the law.<sup>1322</sup> Under this approach, the defendant-official is "not entitled to a jury instruction regarding qualified immunity, since it is a legal question for the court to decide."<sup>1323</sup>

F. Court Has Discretion Whether to First Decide Constitutional Issue or Proceed Directly to Qualified Immunity

In *Saucier v. Katz*,<sup>1324</sup> the Supreme Court held that when qualified immunity is asserted as a defense, the court must first determine if the complaint states a violation of a federally protected right, and only if it does, then proceed to determine whether that right was clearly established.<sup>1325</sup> In *Pearson v. Callahan*,<sup>1326</sup> however, the Supreme Court overturned *Saucier*'s "rigid ordering of issues." It held that federal district courts have discretion to follow the two-step approach, and first decide whether the complaint states a violation of a federally protected right, or to proceed directly to the qualified immunity issue of whether the defendant violated clearly established federal law.<sup>1327</sup> The Court acknowledged that adherence to the *Saucier* requirement (that courts first decide whether the complaint states a violation of a federal protected right) has advantages in some circumstances: among other things, its methodology promotes the development and clarification of federal constitutional standards. This is especially so for issues not likely to arise outside the context of § 1983 damages and qualified immunity, such as in injunction actions and criminal prosecutions.<sup>1328</sup> In addition, there are cases in which it "may be difficult to decide whether a right is clearly established without deciding precisely what the existing con-

stitutional right happens to be.”<sup>1329</sup> *Pearson* acknowledged that *Saucier*’s methodology “is often beneficial,”<sup>1330</sup> and that making the qualified immunity protocol discretionary rather than mandatory “does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether the procedure is worthwhile in particular cases.”<sup>1331</sup>

However, adherence to the *Saucier* methodology does not always make sense. There are cases in which it is apparent that the pertinent federal law did not establish a violation of plaintiff’s clearly established federal rights. In these instances, absent some special consideration, a lower federal court should not have to struggle with the constitutional merits when it can easily conclude that, regardless of the constitutional merits, the defendant will be protected from liability by qualified immunity because the federal law was not clearly established.<sup>1332</sup> In these circumstances resolution of the merits of the constitutional claim would have no effect on the ultimate outcome of the case because, in any event, defendant will be protected by qualified immunity.<sup>1333</sup>

*Pearson* detailed several circumstances in which it may make sense for a federal court to bypass the “constitutional merits” step and proceed directly to the “clearly established” law issue:

1. where “it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right”,<sup>1334</sup>
2. where “the constitutional question is so factbound that the decision provides little guidance for future cases”,<sup>1335</sup>
3. where it is likely that the constitutional question will soon be decided by a higher court or by an en banc court;<sup>1336</sup>
4. where the constitutional decision rests “on an uncertain interpretation of state law,” rendering the constitutional ruling “of doubtful precedential importance”,<sup>1337</sup> and
5. where “qualified immunity is asserted at the pleading stage, [and] the precise factual basis for the plaintiff’s claim . . . may be hard to identify.”<sup>1338</sup>

Furthermore, as a general proposition, following the *Saucier* two-step procedure runs counter to the *Ashwander v. TVA*<sup>1339</sup> principle of judicial self-restraint that federal courts decide federal constitutional

issues only when necessary, that is, as a last resort rather than as a first resort.<sup>1340</sup>

## V. Appeals

When a district court denies qualified immunity on a summary judgment motion, the defendant may take an immediate appeal from the denial of qualified immunity to the court of appeals *if* the appeal can be decided as a matter of law.<sup>1341</sup> However, it is not always clear whether a qualified immunity appeal presents an issue of law or fact. If the district court denies a defendant's summary judgment qualified immunity motion because there are disputed issues of material fact, the defendant may not take an immediate appeal that contests the district court's factual determinations;<sup>1342</sup> however, under such circumstances, the defendant may take an immediate appeal if the appeal can be decided as a matter of law. Thus, an immediate qualified immunity appeal lies when the appellant:

1. contests the *materiality* of a disputed issue of fact found by the district court, because this is a question of law; or
2. claims entitlement to qualified immunity even on the basis of the facts alleged by the plaintiff, because the qualified immunity can be decided as a matter of law.

Furthermore, an immediate appeal may be taken from the denial of qualified immunity raised on a motion to dismiss, because in this circumstance the appeal presents an issue of law, namely whether, assuming the facts alleged by the plaintiff to be true, the defendant is entitled to qualified immunity.<sup>1343</sup> The courts of appeals at times find that they have jurisdiction over parts of an immunity appeal raising questions of law, though not over other parts raising questions of fact.

A § 1983 defendant may be entitled to take multiple interlocutory qualified immunity appeals. In *Behrens v. Pelletier*,<sup>1344</sup> the Supreme Court held that the defendant may take an immediate appeal from the denial of qualified immunity raised on a motion to dismiss and, if still unsuccessful, from a subsequent denial of qualified immunity raised on summary judgment, provided the summary judgment immunity appeal can be decided as a matter of law.<sup>1345</sup>

Qualified immunity appeals are very costly to civil rights plaintiffs in terms of litigation resources and delay of litigation. Qualified immuni-

ty appeals normally stay proceedings on the § 1983 claim in the district court.<sup>1346</sup> However, the plaintiff may ask the district court to certify that an interlocutory qualified immunity appeal is frivolous.<sup>1347</sup> “This practice . . . enables the district court to retain jurisdiction pending summary disposition of the appeal and thereby minimizes disruption of the ongoing proceedings.”<sup>1348</sup>

In *Ortiz v. Jordan*,<sup>1349</sup> the Supreme Court held that, after trial, the defending officers may not appeal from the district court’s denial of the their summary judgment qualified immunity motion, because:

Once the case proceeds to trial, the full [trial] record developed in court supersedes the record existing at the time of the summary judgment motion. A qualified immunity defense . . . does not vanish when a district court [rejects the summary judgment motion. The immunity defense] remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court.<sup>1350</sup>

“After trial, if defendants continue to urge qualified immunity, the decisive question, ordinarily, is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense.”<sup>1351</sup> To preserve for appeal the defendant’s right to qualified immunity on the basis of the trial record, the defendant must make a post-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) on the ground that the evidence was not legally sufficient to sustain the verdict. The defendants in *Ortiz* failed to make such a motion.

The Court did not decide whether the result would be different if the qualified immunity defense presented a purely legal issue with respect to undisputed facts.

## 17. Exhaustion of State Remedies

### *Preiser-Heck Doctrine, Notice of Claim, and Ripeness*

#### **I. State Judicial Remedies: *Parratt-Hudson* Doctrine**

State judicial remedies generally need not be exhausted in order to bring a § 1983 action. “The federal [§ 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”<sup>1352</sup> When a § 1983 plaintiff has pursued a state judicial remedy, or was an involuntary state court litigant (such as a criminal defendant), the state court judgment may be entitled to preclusive effect in the § 1983 action.<sup>1353</sup>

Under the *Parratt-Hudson*<sup>1354</sup> doctrine, when a deprivation of liberty or property results from “random and unauthorized” official conduct, the availability of an adequate postdeprivation judicial remedy satisfies procedural due process.<sup>1355</sup> The *Parratt-Hudson* doctrine does not apply when the deprivation results from enforcement of the established state procedure,<sup>1356</sup> or from actions by officials with authority to both cause deprivations and provide predeprivation process.<sup>1357</sup> *Parratt-Hudson* is not an exhaustion doctrine; when applicable, it results in rejection of procedural due process claims on the merits, not for failure to exhaust. Even when the *Parratt-Hudson* doctrine does not apply, a § 1983 plaintiff who asserts a procedural due process claim has the burden of showing the inadequacy of the available state remedies.

In *District Attorney’s Office v. Osborne*,<sup>1358</sup> the § 1983 complaint asserted substantive and procedural due process rights to postconviction access to evidence for DNA testing. The Supreme Court held that the plaintiff was not required to “exhaust state-law remedies”; but to prevail on his procedural due process claim, he had the “burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.”<sup>1359</sup> A postdeprivation remedy may be adequate under *Parratt-Hudson* even if it does not afford all of the relief available under § 1983, such as an award of attorneys’ fees.<sup>1360</sup>

## II. *Preiser, Heck, and Beyond*

In *Preiser v. Rodriguez*,<sup>1361</sup> the Supreme Court held that a prisoner's constitutional claim challenging the fact or duration of confinement and seeking immediate or speedier release must be brought under federal habeas corpus, following exhaustion of state remedies, even though such a claim may come within the literal terms of § 1983. In these circumstances, federal habeas corpus is the exclusive remedy. The Court reasoned that the more specific federal habeas remedy should prevail over the more general § 1983 remedy, and that prisoners should not be allowed to evade the federal habeas exhaustion requirement by filing the claim under § 1983.

### A. Procedural Due Process and Conditions of Confinement

The decision in *Preiser*, however, does not preclude prisoners from utilizing § 1983 either to enforce procedural due process protections or to challenge the conditions of their confinement. In *Wilkinson v. Dotson*,<sup>1362</sup> the Supreme Court held that the prisoners' challenge to parole release procedures could be asserted under § 1983 because the prisoners sought only enhanced process; they did not challenge either the fact or length of their confinement, and did not seek immediate or speedier release. If successful, the plaintiffs, at most, could obtain new parole release hearings. In *Nelson v. Campbell*,<sup>1363</sup> the Court held that a death row inmate may assert a § 1983 challenge to the constitutionality of a medical procedure that would have been a precursor to his lethal injection. The Court viewed the claim as a "condition of confinement" medical treatment claim.<sup>1364</sup> It did not decide whether a challenge to the method of execution itself, e.g., lethal injection, may be asserted under § 1983.<sup>1365</sup>

### B. Claims for Damages (*Heck v. Humphrey*)

In *Heck v. Humphrey*,<sup>1366</sup> the Supreme Court held that a plaintiff who seeks damages on a § 1983 claim that necessarily implicates the constitutionality of the claimant's state conviction or sentence must demonstrate that the conviction or sentence has been overturned, either judicially or by executive order. Strictly speaking, the *Heck* doctrine is not an exhaustion doctrine; in fact, it is more onerous than an exhaustion requirement because, unless and until the conviction is overturned, the § 1983 claim is not cognizable. However, sometimes the *Heck* doctrine

can work in a § 1983 plaintiff's favor by delaying the accrual of the class for relief for statute of limitations purposes.

In *Nelson v. Campbell*,<sup>1367</sup> the Supreme Court said that it was

careful in *Heck* to stress the importance of the term “necessarily.” For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not “necessarily imply that plaintiff’s conviction was unlawful.”<sup>1368</sup>

Lower courts sometimes have a difficult time determining whether a § 1983 claim “necessarily implicates” the validity of a conviction. For example, it is not always clear whether, under the *Heck* doctrine, a § 1983 excessive force claim necessarily implicates a conviction for such crimes as resisting arrest, assault or battery of an officer, or obstructing an officer. Resolution of the issue requires a careful analysis of the specific facts alleged in the § 1983 excessive force complaint in relation to the specific crime for which the plaintiff was convicted.<sup>1369</sup>

### C. *Skinner v. Switzer*

In *Skinner v. Switzer*,<sup>1370</sup> the Supreme Court, relying heavily on *Wilkinson v. Dotson*,<sup>1371</sup> held that the *Heck* doctrine did not bar a convicted state prisoner from asserting a procedural due process right of access to evidence for the purpose of postconviction DNA testing under § 1983. Such a claim is not required to be asserted in a habeas corpus proceeding.

The Court reasoned that similar to the procedural due process claim in *Wilkinson*, “a postconviction [procedural due process] claim for DNA testing is properly pursued in a § 1983 action” because “[s]uccess in the suit gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive. In no event will a judgment that simply orders DNA tests ‘necessarily impl[y] the unlawfulness of the State’s custody.’”<sup>1372</sup> Although success on the claim for DNA testing might further *Skinner*’s ultimate aim of overturning his conviction, there is no authority that “habeas corpus [i]s the sole remedy, or even an available one, whe[n] the relief sought” will not lead to immediate or speedier release from custody.<sup>1373</sup>



#### D. *Heck* and Accrual of Claim

The *Heck* doctrine has implications for the statute of limitations, because a § 1983 claim that necessarily implicates the validity of a conviction or sentence is not cognizable and thus does not accrue until the conviction has been overturned. Over time, *Heck* has become a more important precedent than *Preiser* and is asserted in large numbers of § 1983 actions.

In *Wallace v. Kato*,<sup>1374</sup> the Supreme Court indicated that whether a § 1983 claim attacks the validity of a conviction within the meaning of the *Heck* doctrine should be evaluated as of the date the § 1983 claim accrued. In *Wallace*, the plaintiff's § 1983 challenge to his warrantless arrest accrued on the date he was bound over for trial, which was long before he was convicted. On that date, there was obviously no conviction that could be attacked. In other words, as the Court expressly acknowledged, the *Heck* doctrine does not encompass *future* convictions. The Court said that the "impracticability" of applying *Heck* to future convictions was "obvious," i.e., it would invite speculation about whether there will be a conviction and, if so, whether the federal § 1983 action would impugn the conviction.<sup>1375</sup>

#### E. Prison Disciplinary Sanctions

In *Edwards v. Balisok*,<sup>1376</sup> the Supreme Court held that the *Preiser-Heck* doctrine applies to prisoner procedural due process claims that necessarily implicate the validity of a prison disciplinary sanction. The plaintiff in *Edwards* alleged that he was denied an opportunity to defend the disciplinary charges because of the hearing officer's deceit and bias. The Court held that this claim was subject to *Heck* because the alleged procedural defect, if established, would necessarily imply the invalidity of the sanctioned deprivation of good-time credits.<sup>1377</sup> On the other hand, in *Muhammad v. Close*,<sup>1378</sup> the Court held that a prisoner's challenge to some aspect of a prison disciplinary proceeding that does not implicate either the finding of "guilt" or the disciplinary sanction is not governed by the *Heck* doctrine. The prisoner in *Muhammad* challenged, under § 1983, his prehearing lockup, but did not challenge his disciplinary conviction or sanction. Because the § 1983 complaint did not contest either the disciplinary conviction or sanction, it was not subject to *Heck*.<sup>1379</sup>

#### F. When Habeas Is Not Available

In *Spencer v. Kemna*,<sup>1380</sup> five justices in concurring and dissenting opinions took the position that the *Heck* doctrine does not apply to § 1983 claimants who are not in state custody and who therefore cannot seek relief in a federal habeas corpus proceeding. The lower courts are in conflict over whether the positions of these five justices should be viewed as binding precedent.<sup>1381</sup>

### III. State Administrative Remedies; PLRA

#### A. Plaintiffs Generally Not Required to Exhaust State Administrative Remedies

In *Patsy v. Board of Regents*,<sup>1382</sup> the Supreme Court held that state administrative remedies need not be exhausted in order to bring suit under § 1983. The Court reasoned that individuals should not have to seek relief from the state and local authorities against whom § 1983 guarantees immediate judicial access. As with state judicial remedies, a § 1983 plaintiff who asserts a procedural due process claim may have to pursue state administrative remedies in order to demonstrate their inadequacy.<sup>1383</sup>

#### B. PLRA Exhaustion Requirement

The Prison Litigation Reform Act (PLRA) requires prisoners to exhaust “available” administrative remedies before bringing suit to contest the conditions of their confinement.<sup>1384</sup> The PLRA exhaustion requirement has generated a tremendous amount of decisional law.

In *Booth v. Churner*,<sup>1385</sup> the Supreme Court held that prisoners who seek money damages judicially must satisfy the PLRA exhaustion requirement even when the available administrative procedures do not afford a monetary remedy, so long as some type of relief is available administratively. In *Porter v. Nussle*,<sup>1386</sup> the Court held that prisoner excessive force claims are challenges to conditions of confinement, and thus subject to the PLRA exhaustion requirement. It found “that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”<sup>1387</sup>

In *Woodford v. Ngo*,<sup>1388</sup> the Supreme Court held that the PLRA requirement is not satisfied by the filing of an untimely or otherwise pro-

cedurally defective administrative grievance. Rather, the PLRA requires “proper exhaustion,” i.e., the prisoner’s grievance must be in compliance with the agency’s deadlines and other procedural rules. The Court left open the possibility of an exception for cases in which “prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners.”<sup>1389</sup> It also noted that “the PLRA exhaustion requirement is not jurisdictional, and thus allow[s] a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.”<sup>1390</sup>

In *Jones v. Bock*,<sup>1391</sup> the Supreme Court held that the prisoner is not required to plead compliance with the PLRA exhaustion requirement. Rather, failure to exhaust is an affirmative defense. The Court also held that exhaustion is not per se inadequate merely because a prison official sued in the § 1983 action was not named in the administrative grievance. It acknowledged, however, that under *Woodford*, prisoners must comply with the grievance procedures, and that a grievance procedure may require the prisoner to name a particular official. “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”<sup>1392</sup> Finally, the Court held that the PLRA does not require dismissal of the entire action when “the prisoner has failed to exhaust some, but not all of the claims asserted in the complaint.”<sup>1393</sup> A “total exhaustion” rule could have the unwholesome effect of inmates filing more separate lawsuits “to avoid the possibility of an unexhausted claim tainting the others. That would certainly not comport with the purpose of the PLRA to reduce the quantity of inmate suits.”<sup>1394</sup> Factual issues pertaining to the PLRA exhaustion requirement are for the court.<sup>1395</sup>

When a prisoner’s § 1983 complaint is dismissed for failure to satisfy the PLRA exhaustion requirement, dismissal should almost always be without prejudice so that it does not bar reinstatement of the suit after exhaustion is satisfied.<sup>1396</sup>

#### **IV. Notice of Claim**

In *Felder v. Casey*,<sup>1397</sup> the Supreme Court held that state notice-of-claim rules may not be applied to § 1983 claims. Because a notice-of-claim rule is

not one of those universally recognized rules necessary for fair procedure, like a limitation defense or a survivorship rule, the absence of a federal notice-of-claim rule is not a “deficiency” in the federal law requiring resort to state law under 42 U.S.C. § 1988(a). Furthermore, the Court found that state notice-of-claim rules unduly burden and discriminate against civil rights claimants, and impose an exhaustion requirement incompatible with the *Patsy*<sup>1398</sup> rule that a § 1983 plaintiff is not required to exhaust state administrative remedies. However, it acknowledged that state notice-of-claim rules may be applied to state law claims that are supplemental to § 1983 claims.

## V. Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank*,<sup>1399</sup> the Supreme Court imposed stringent two-prong ripeness requirements for § 1983 regulatory takings claims in which the plaintiff claims that her property was taken without just compensation. First, the plaintiff must obtain a final determination from land use authorities concerning the permissible use of the property. This requirement is satisfied when the permissible uses of the property are known to a reasonable degree of certainty.<sup>1400</sup> Second, the plaintiff must obtain a final determination from the state court of the right to just compensation.<sup>1401</sup> In the process of satisfying the second requirement, normal preclusion principles will apply in the federal § 1983 action.<sup>1402</sup> The interplay of ripeness and preclusion is a potentially lethal “catch-22” for § 1983 takings claimants.<sup>1403</sup>

## 18. Preclusion Defenses

### I. State Court Judgments

Under the full-faith and credit statute, 28 U.S.C. § 1738, federal courts in § 1983 actions must give state court judgments the same preclusive effect they would receive in state court under state law.<sup>1404</sup> This principle controls so long as the federal litigant against whom preclusion is asserted had a full and fair opportunity to litigate his federal claims in state court. A full and fair opportunity to be heard requires only that state judicial procedures meet minimal procedural due process requirements.<sup>1405</sup>

The full-faith and credit statute governs even with respect to federal claims asserted by federal court plaintiffs who were involuntary state court litigants, like criminal defendants,<sup>1406</sup> and takings claimants who were required to pursue a state court just-compensation remedy in order to satisfy ripeness requirements.<sup>1407</sup> Furthermore, § 1738 governs even if the federal court § 1983 claimant has no alternative federal remedy, as when, under *Stone v. Powell*,<sup>1408</sup> a Fourth Amendment claim is not assertable in a federal habeas corpus proceeding.<sup>1409</sup> Section 1738 applies to claims that could have been, but were not, litigated in the state court proceeding, if state preclusion law encompasses the doctrine of claim preclusion.<sup>1410</sup> The Supreme Court has directed the federal courts not to carve out exceptions to preclusion required by § 1738 in § 1983 actions, even when there may be good policy reasons for doing so.<sup>1411</sup>

### II. Administrative Res Judicata

In *University of Tennessee v. Elliott*,<sup>1412</sup> the Supreme Court held that an agency's fact findings may preclude relitigation of the facts in a § 1983 action. "[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' . . . federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts."<sup>1413</sup> The decision in *Elliott* was not based on the full-faith and credit statute, but on federal common-law preclusion principles.

### III. Arbitration Decisions

In *McDonald v. City of West Branch*,<sup>1414</sup> the Supreme Court held that arbitration decisions are not entitled to preclusive effect in § 1983 actions. The Court found that an arbitration proceeding is not a judicial proceeding within the meaning of the full-faith and credit statute. Furthermore, Congress intended § 1983 to be judicially enforced, and arbitration is not an adequate substitute for judicial enforcement.

The Supreme Court has interpreted *McDonald* narrowly. In *14 Penn Plaza LLC v. Pyett*,<sup>1415</sup> it upheld the enforceability of a collective bargaining agreement requiring union members to arbitrate their claims under the Age Discrimination in Employment Act. In so doing, it read *McDonald* as holding that an arbitration decision that was not appealed was not entitled to preclusive effect in a § 1983 action and, further, that “*McDonald* hinged on the scope of the collective-bargaining agreement and the arbitrator’s parallel mandate.”<sup>1416</sup>

## 19. Statute of Limitations

### I. Limitations Period

There is no federal statute of limitations for § 1983 claims. When federal law is silent on an issue in a federal court § 1983 action, 42 U.S.C. § 1988(a) requires the federal court to borrow state law on the issue, provided it is consistent with the policies underlying § 1983.<sup>1417</sup> Therefore, § 1988(a) requires federal courts to borrow a state's limitations period. In *Wilson v. Garcia*,<sup>1418</sup> the Supreme Court held that the federal court should borrow the state's general limitations period for personal injury actions, as long as the period is not inconsistent with the policies of § 1983. This means that the governing limitations period for federal § 1983 actions may differ from state to state. A state's unduly short limitations period, e.g., six months, is inconsistent with the policies of § 1983.<sup>1419</sup> "[W]here state law provides multiple statutes of limitations for personal injury actions, courts . . . should borrow the general or residual statute for personal injury actions."<sup>1420</sup>

### II. Relation Back

Whether an amended complaint "relates back" to the filing of the original complaint for limitations purposes is governed by Federal Rule of Civil Procedure 15(c). Under Rule 15(c), an amended complaint against the same defendants named in the original complaint will relate back to the filing of the original complaint if the claim in the amended complaint arose out of the same conduct or transaction in the original complaint.<sup>1421</sup> However, if an amended complaint "changes" the party defendant, (1) the amended complaint will relate back to the filing of the original complaint if the amended complaint arose out of the same conduct as the original complaint; (2) the newly named defendant, within the period for service of the summons and complaint, received notice of the institution of the action that will avoid prejudice in defending the action; and (3) the newly named defendant "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."<sup>1422</sup> Rule 15(c) provides that when, as in § 1983 actions, state law governs the limitations period, a state law "relation back"

doctrine that is more forgiving than Rule 15(c)'s "relation back" doctrine will govern the issue.<sup>1423</sup>

In *Krupski v. Costa Cruciere*,<sup>1424</sup> a non-§ 1983 case, the Supreme Court rendered an important decision interpreting the Rule 15(c) requirement for "relation back" purposes. The Court held that relation back under Rule 15(c) depends on whether the newly added *defendant* knew or should have known that, but for the *plaintiff's* mistake, the action would have been brought against it originally.<sup>1425</sup> The lower court erred in holding that Rule 15(c) was not satisfied because the plaintiff knew, or should have known, of the proper defendant before filing her original complaint; and the plaintiff delayed in amending the complaint. The Court held "that relation back under Rule 15(c)(1)(C) depends on what the [newly named defendant] knew or should have known, not on the amending [plaintiff's] knowledge or its timeliness in seeking to amend the pleading."<sup>1426</sup>

Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known during the Rule 4(m) period [for service of the summons and complaint], not what the *plaintiff* knew or should have known at the time of filing her original complaint. Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake.<sup>1427</sup>

The Court said that a "mistake" is an "error, misconception, or misunderstanding; an erroneous belief."<sup>1428</sup> The fact that "a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity."<sup>1429</sup> For example, the plaintiff may have known of A's identity, but was mistaken factually of her role in the incident in question, or whether A was legally responsible for the incident in question. Nor is the *reasonableness* of the plaintiff's mistake an issue under Rule 15.<sup>1430</sup> The Court further ruled that the fact that the plaintiff unreasonably delayed in filing the amended complaint is irrelevant to the relation back inquiry. Therefore, the plaintiffs' lack of diligence cannot justify denial of relation back.

Most federal courts hold that an amendment of a complaint substituting a John Doe defendant with the names of the actual officers does not relate back to the filing of the original complaint.<sup>1431</sup> The rationale of these



decisions is that lack of knowledge about the names of the alleged wrongdoers/defendants is not a “mistake” within the meaning of Rule 15(c).<sup>1432</sup>

### III. Accrual

Unlike the selection of the limitations period, which is determined by reference to state law, the accrual of a § 1983 claim is a question of federal law.<sup>1433</sup> Section 1983 claims generally accrue when the plaintiff knows or has reason to know of the injury, which is the basis of her claim.<sup>1434</sup> In applying this standard, courts seek to determine “what event should have alerted the typical lay person to protect his or her rights.”<sup>1435</sup> In *Wallace v. Kato*,<sup>1436</sup> the Supreme Court stated that a § 1983 claim accrues when the plaintiff has “a complete and present cause of action.”<sup>1437</sup> It is unclear whether this is the same as the “know or should know of the injury” standard. Post-*Wallace*, the courts of appeals have continued to apply the “knew or reasonably should have known” accrual rule.<sup>1438</sup> In *Heck v. Humphrey*,<sup>1439</sup> the Court held that a § 1983 “cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.”<sup>1440</sup>

The determination of the proper accrual date is not always obvious, especially when the *Heck* doctrine may be implicated. In *Wallace*, the Court held that the § 1983 plaintiff’s Fourth Amendment challenge to his warrantless arrest accrued when legal process issued, i.e., when he appeared before the examining magistrate judge and was bound over for trial.

Because there were a number of possible accrual dates in *Wallace*, it is necessary to pay especially close attention to the sequence of events in that case. In January 1994, the Chicago police questioned Andre Wallace, then fifteen years of age, about a recent homicide. After an all-night interrogation lasting into the early morning hours, Wallace waived his *Miranda* rights and confessed to the murder. He was arrested (without an arrest warrant) sometime that day. Subsequently—we are not told exactly when—he appeared before the examining magistrate judge and was bound over for trial. If the state wants to hold a suspect who was subject to a warrantless arrest, the Fourth Amendment requires a probable cause determination from a magistrate judge within a reasonable time, and forty-eight hours after the arrest is a presumptively reasonable time.<sup>1441</sup>

Prior to trial, Wallace’s defense attorney unsuccessfully sought to suppress Wallace’s confession and other statements he gave the police. Wallace

was convicted of murder. But in 2001, the conviction was reversed on appeal on the ground that Wallace was arrested without probable cause, and his incriminating statements were the product of the illegal arrest. In 2001, the state appeals court ordered a new trial, but the next year the prosecutors dropped the charges against Wallace, and he was released.

In 2003, seven years after his arrest but only a year after the charges were dropped, Wallace filed a federal court § 1983 action asserting, *inter alia*, a claim for damages against several Chicago police officers based on his illegal arrest. The parties agreed that the governing limitations period was the Illinois two-year personal injury period. But they sharply disagreed over when the limitations period began to run, i.e., when Wallace's § 1983 claim accrued. There were several possible accrual dates:

1. The date Wallace was arrested in 1994. This would render the § 1983 claim untimely.
2. The date Wallace appeared before the magistrate judge. This, too, would render the § 1983 action untimely because more than two years elapsed between that date and the filing of the § 1983 suit, "even leaving out of the count the period before [Wallace] reached his majority."<sup>1442</sup>
3. The date (August 31, 2001) the appellate court reversed Wallace's conviction and remanded for a new trial, which would render the § 1983 claim timely.
4. The date (April 10, 2002) when prosecutors dropped the charges against Wallace, which also would have rendered the § 1983 suit timely.

The Court held that Wallace's § 1983 wrongful arrest claim accrued on the date he appeared before the magistrate judge and was bound over for trial, rendering the § 1983 action untimely. Although the § 1983 claim was premised upon a violation of Fourth Amendment rights, the Supreme Court relied heavily on common-law concepts governing false arrest, false imprisonment, and malicious prosecution to determine the proper accrual date.

The Court said that the plaintiff "*could have* filed suit as soon as the alleged wrongful arrest occurred, subjecting him to the harm of involuntary detention."<sup>1443</sup> Since the plaintiff had a "complete" cause of action on the date of his arrest, the limitations period "*would normally* commence to

run from that date.”<sup>1444</sup> There was a “refinement,” however, stemming from the common law’s treatment of false arrest and false imprisonment. These two torts overlap in the sense that false arrest is a “species” of false imprisonment; every confinement is an imprisonment. The Court found that the closest common-law analogy to Wallace’s § 1983 warrantless arrest/Fourth Amendment claim was false imprisonment based on “*detention without legal process*.”<sup>1445</sup> The common-law rule is that such a claim for relief accrues when the false imprisonment comes to an end. “Since false imprisonment consists of detention *without* legal process, a false imprisonment claim accrues when the victim becomes held *pursuant* to such *process*—when he is bound over by a magistrate or arraigned on charges.”<sup>1446</sup> The claim for relief accrues at this time even though the claim could have been filed at the earlier time of the arrest. Furthermore, the claim accrues at this time even “assuming . . . that all damages for detention pursuant to legal process could be regarded as consequential damages attributable to the unlawful arrest. . . .”<sup>1447</sup>

Under common law, after legal process is issued, any damages for unlawful detention would be based not on false arrest but on malicious prosecution. Malicious prosecution “remedies detention accompanied, not by absence of legal process, but by *wrongful institution of legal process*.”<sup>1448</sup> The Court rejected Wallace’s argument that his false imprisonment ended and his claim accrued when the state dropped the criminal charges against him and he was released from custody. Rather, the false imprisonment ended much earlier, when legal process was issued against Wallace, i.e., when he appeared before the examining magistrate judge. Holding firm to the common-law rule, the Court also rejected Wallace’s argument that his release from custody should be the proper accrual date because, he argued, the unconstitutional arrest “set the wheels in motion,” leading to the coerced confession, conviction, and incarceration.

Wallace argued, again in vain, that under the *Heck* doctrine his § 1983 claim could not accrue until the state dropped the criminal charges against him. The Supreme Court found the *Heck* doctrine inapplicable because on the date Wallace was held pursuant to legal process, there was no criminal conviction that the § 1983 cause of action could impugn. Moreover, the Court held that the *Heck* doctrine does not extend to *possible future convictions*. The “impracticability” of applying *Heck* to future convictions is “obvious,” namely, it would invite speculation whether there will be a

conviction and, if so, whether the pending federal § 1983 action would impugn the conviction.<sup>1449</sup>

When, as in *Wallace*, there is more than one plausible accrual date, the Supreme Court appears inclined to pick the earlier date.<sup>1450</sup> This has also been true in § 1983 public employment cases. In employment termination cases, for example, the Supreme Court held that the § 1983 claim accrues when the employee is notified of the termination, not when the termination became effective.<sup>1451</sup>

Federal courts have generally been reluctant to apply what is known as the “continuing violation” doctrine in § 1983 actions.<sup>1452</sup> In *National Railroad Passengers Corp. v. Morgan*,<sup>1453</sup> a Title VII action, the Supreme Court held that a discrete act, such as employment termination, failure to promote, denial of transfer, refusal to hire, or a retaliatory adverse employment decision, is a *separate* unlawful employment practice for accrual purposes. The Court ruled that the continuing violation doctrine does not apply to these discrete acts merely because they are plausibly or sufficiently related to each other. It distinguished these claims from racial or sexual “hostile environment” claims, which involve repeated conduct and the cumulative effect of continued acts. These claims are not time-barred if the acts are part of the same unlawful employment practice, and at least one act falls within the governing limitations period. The courts of appeals have applied *Morgan* to § 1983 actions.<sup>1454</sup>

#### IV. Tolling

In *Wallace v. Kato*,<sup>1455</sup> the Supreme Court stated that in § 1983 suits it has “generally referred to state law for tolling rules . . .”<sup>1456</sup> The Court in *Wallace* found that Illinois tolling law did not provide for tolling during the pendency of the criminal proceeding. It also rejected the dissent’s position that the limitations period should be equitably tolled during the pendency of the criminal proceedings, and during any period in which the criminal defendant challenges the conviction in state court on the same basis as that underlying the § 1983 suit.<sup>1457</sup> The majority reminded the dissent that “[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.”<sup>1458</sup> In other words, it is fairly common for a § 1983 action to relate to pending criminal proceedings and the mere fact that it does will not justify application of equitable tolling.

## 20. Survivorship and Wrongful Death

### I. Survivorship

Survivorship of § 1983 claims is not covered by federal law. In *Robertson v. Wegmann*,<sup>1459</sup> the Supreme Court held that to remedy this deficiency, 42 U.S.C. § 1988(a) requires federal courts to borrow state survivorship law, so long as it is not inconsistent with the policies of § 1983.<sup>1460</sup> The Court identified the policies underlying § 1983 as including “compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.”<sup>1461</sup> It ruled, however, that the mere fact that the particular § 1983 claim abates under state law does not mean that the state law is inconsistent with the policies of § 1983. Rather, whether state survivorship law is compatible with the policies of § 1983 depends on whether that state law is generally hospitable to the survival of § 1983 claims.<sup>1462</sup> The Court held that the Louisiana law was not inconsistent with the policies of § 1983 despite causing the *particular* § 1983 claim to abate.<sup>1463</sup> However, it indicated that the result might be different if the “deprivation of federal right caused death.”<sup>1464</sup>

### II. Wrongful Death

The Supreme Court has not resolved whether a wrongful death claim may be brought under § 1983. There is considerable disagreement on this issue in the lower courts.<sup>1465</sup> Some courts have viewed the absence of a federal § 1983 wrongful death policy as a deficiency in federal law and, under § 1988(a), have borrowed state wrongful death law.<sup>1466</sup> Other courts have inquired whether the defendant’s conduct, which caused a death, violated the constitutionally protected rights of a surviving relative.<sup>1467</sup> There is also scholarship supporting the argument that § 1983 itself authorizes a wrongful death remedy.<sup>1468</sup> Of course, the § 1983 plaintiff may attempt to assert a state law wrongful death claim under the federal court’s supplemental jurisdiction.<sup>1469</sup>

## 21. Abstention Doctrines

Even though a federal court has subject-matter jurisdiction over a § 1983 action, it may decline to exercise that jurisdiction if the case falls within one or more of the abstention doctrines. These abstention doctrines are intended to apply in relatively narrow circumstances. The Supreme Court has described a federal court's obligation to adjudicate claims properly within its jurisdiction as "virtually unflagging."<sup>1470</sup> Accordingly, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule,"<sup>1471</sup> and the Court has limited the circumstances appropriate for abstention.

The major abstention doctrines in § 1983 actions are *Pullman*,<sup>1472</sup> *Younger*,<sup>1473</sup> *Colorado River*,<sup>1474</sup> and *Burford*.<sup>1475</sup> The domestic relations doctrine has been raised in some § 1983 actions, but much less frequently than the other abstention doctrines. The Tax Injunction Act normally bars federal § 1983 actions contesting state and local tax policies.<sup>1476</sup>

### I. *Pullman* Abstention; State Certification Procedure

Under *Pullman* abstention, named after *Railroad Commission of Texas v. Pullman Co.*,<sup>1477</sup> a federal court may abstain when the contested state law is ambiguous and susceptible of a state court interpretation that may avoid or modify the federal constitutional issue. The Supreme Court said that "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question."<sup>1478</sup> *Pullman* abstention is applicable only when the issue of state law is unsettled, and is "sufficiently likely" to be subject to an interpretation that will avoid or modify the federal constitutional question.<sup>1479</sup> When a federal court invokes *Pullman* abstention, the § 1983 claimant must seek a state court interpretation of the state law from the highest court in the state. In some cases this may be accomplished expeditiously pursuant to a state certification procedure.

In *Arizonans for Official English v. Arizona*,<sup>1480</sup> the Supreme Court suggested that, where available, a state certification procedure should be used instead of *Pullman* abstention. State certification procedures allow federal courts to directly certify unsettled, dispositive questions of state law to the

highest court of the state for authoritative construction. The Court explained:

Certification today covers territory once dominated by a deferral device called “*Pullman* abstention”. . . . Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. If settlement of the state-law question did not prove dispositive of the case, the parties could return to the federal court for decision of the federal issues. Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court . . . Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.<sup>1481</sup>

After completion of state court proceedings, the § 1983 claimant may return to federal court unless she has voluntarily litigated her federal claims fully in state court.<sup>1482</sup> The plaintiff may make an “*England* reservation” on the state court record of her right to litigate the federal claim in federal court.<sup>1483</sup>

In *England v. Louisiana State Board of Medical Examiners*,<sup>1484</sup> the Court set out the procedures litigants must follow when *Pullman* abstention is invoked. A party has the right to return to the federal district court for a final determination of its federal claim once the party has obtained the authoritative state court construction of the state law in question.<sup>1485</sup> A party can, but need not, expressly reserve this right, and in no event will the right be denied, “unless it clearly appears that he voluntarily . . . fully litigated his federal claim in the state courts.”<sup>1486</sup> A party may elect to forgo the right to return to federal court by choosing to litigate the federal constitutional claim in state court.<sup>1487</sup>

Under *Pullman* abstention, a district court generally retains jurisdiction over the case, but stays its proceedings while the state court adjudicates the issue of state law. Thus, *Pullman* abstention does not “involve the abdication of jurisdiction, but only the postponement of its exercise.”<sup>1488</sup>

## II. *Younger* Abstention

The most frequently invoked abstention doctrine in § 1983 actions is *Younger* abstention, named after the leading case of *Younger v. Harris*.<sup>1489</sup> *Younger* abstention generally prohibits federal courts from granting relief that interferes with pending state criminal prosecutions, or with pending state civil proceedings that implicate important state interests.<sup>1490</sup> The *Younger* doctrine “espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings.”<sup>1491</sup> It is based primarily on principles of federalism that require federal court non-interference with state judicial proceedings.

In *Younger*, the Supreme Court held that a federal district court generally should not enjoin a pending state criminal prosecution. In *Samuels v. Mackell*,<sup>1492</sup> the Court broadened *Younger*’s reach, holding that the doctrine encompasses claims for declaratory relief. In federal cases in which a state criminal prosecution had begun prior to the federal suit, “where an injunction would be impermissible under [*Younger*] principles, declaratory relief should ordinarily be denied as well.”<sup>1493</sup> The Court has not directly addressed whether *Younger* applies when a federal plaintiff is seeking only monetary relief with respect to matters that are the subject of a pending state criminal proceeding. In *Deakins v. Monaghan*,<sup>1494</sup> the Court held that a district court “has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding.”<sup>1495</sup> The Court, however, has implied, that *Colorado River* abstention might be appropriate in such situations.<sup>1496</sup>

In a series of decisions beginning with *Huffman v. Pursue, Ltd.*,<sup>1497</sup> the Supreme Court extended the application of *Younger* to bar federal interference with various state civil proceedings implicating important state interests. In *Huffman*, the Court noted that the state court civil nuisance proceeding at issue was in important respects “more akin to a criminal prosecution than are most civil cases,” because the state was a party to the proceeding, and the proceeding itself was in aid of and closely related to criminal statutes.<sup>1498</sup> Thus, while refusing to make any general pronouncements as to *Younger*’s applicability to all civil litigation, the Court held that the district court should have applied *Younger* principles in deciding whether to enjoin the state civil nuisance proceeding.<sup>1499</sup>

In *Middlesex County Ethics Committee v. Garden State Bar Ass’n*,<sup>1500</sup> the Court was faced with the question of whether pending state bar dis-



ciplinary hearings were subject to the principles of *Younger*. In holding *Younger* applicable, the Court said that three inquiries are relevant to *Younger* abstention:

1. is there an “ongoing” state judicial proceeding;
2. does the state proceeding “implicate important state interests”; and
3. “is there an adequate opportunity in the state proceedings to raise constitutional challenges.”<sup>1501</sup>

In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,<sup>1502</sup> the Court held that *Younger* abstention applies to state-instituted, coercive, quasi-judicial administrative proceedings implicating important state interests, so long as there is an adequate opportunity to litigate the federal claims in the administrative proceeding or in a state court judicial review proceeding.<sup>1503</sup> This aspect of the *Younger* doctrine is sometimes referred to as *Younger-Dayton* abstention.

In *Sprint Communications, Inc. v. Jacobs*,<sup>1504</sup> the Supreme Court clarified and narrowed the reach of *Younger* abstention. The Court ruled that *Younger* abstention applies only in three “exceptional categories”:

1. ongoing state criminal prosecutions;
2. state-instituted civil enforcement proceedings; and
3. state court orders issued in state civil cases in furtherance of the state courts’ ability to perform their judicial functions.<sup>1505</sup>

The Court said that the three conditions articulated in *Middlesex* were not meant to be “dispositive; they were, instead, additional factors appropriately considered by the federal court before invoking *Younger*.”<sup>1506</sup> The three *Middlesex* factors should be understood in the context of the state-instituted, quasi-criminal attorney disciplinary proceeding in that case. In other words, *Younger* abstention should not be invoked simply because the federal defendant is able to “identify a plausibly important state interest” in the state court proceeding.<sup>1507</sup>

The Court in *Sprint Communications* held that *Younger* abstention should not be invoked because of a pending state court civil proceeding to resolve a dispute between purely private parties involving the same subject-matter as the federal suit.<sup>1508</sup> Whether a federal court should abstain in these circumstances should be determined under the doctrine of *Colorado River* abstention, discussed in the next subsection.

There are narrow exceptions to the *Younger* doctrine. One exception requires a showing that the state prosecution was undertaken in bad faith, meaning not to secure a valid conviction, but to retaliate against or “chill” the exercise of constitutionally protected rights.<sup>1509</sup> There is also an exception when the pending state proceedings fail to afford a full and fair opportunity to litigate the federal claim, but this is rarely found to be the case, especially because the Supreme Court presumes state procedures afford a full and fair opportunity to litigate federal claims.<sup>1510</sup>

### III. *Colorado River* Abstention

Under *Colorado River* abstention, named after *Colorado River Water Conservation District v. United States*,<sup>1511</sup> a federal court may abstain when there is a “parallel” concurrent proceeding pending in state court. However, even when a “parallel” state court proceeding is pending, a federal court should invoke *Colorado River* abstention only in “exceptional circumstances.” The federal court’s task “is not to find some substantial reason for the exercise of federal jurisdiction,”<sup>1512</sup> but to determine whether exceptional circumstances “justify the *surrender* of that jurisdiction.”<sup>1513</sup>

In *Colorado River*, the federal government brought suit in federal court seeking an adjudication of certain water rights. Soon thereafter, a defendant in the federal suit moved to join the United States in a state court proceeding adjudicating the same water rights. The federal district court subsequently dismissed the suit, abstaining in deference to the state court proceedings.<sup>1514</sup> Although the Supreme Court found that *Pullman*, *Burford*, and *Younger* abstentions did not apply to the facts of this case,<sup>1515</sup> because the federal suit did not involve federal-state comity or avoidance of constitutional issues, it held that dismissal was proper on another ground, namely, “on considerations of ‘wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.’”<sup>1516</sup>

The Court in *Colorado River* set forth the general rule that “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.”<sup>1517</sup> It recognized, however, that exceptional circumstances might permit dismissal of a federal suit because of concurrent state court proceedings.<sup>1518</sup> The Court identified four factors to be considered in determining whether such exceptional circumstances exist: (1) the problems created by two courts exercising con-

current jurisdiction over a res; (2) the relative inconvenience of the federal forum; (3) the goal of avoiding piecemeal litigation; and (4) the order in which the state and federal forums obtained jurisdiction.<sup>1519</sup> In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>1520</sup> the Court underscored the need for exceptional circumstances before a federal court surrenders its jurisdiction over a case on the ground that there is a duplicative proceeding pending in state court.<sup>1521</sup> In addition, the Court ruled that the presence of a question of federal law weighs heavily in favor of retention of federal court jurisdiction.<sup>1522</sup>

The Supreme Court has left open whether the proper course when employing *Colorado River* abstention is a stay or a dismissal without prejudice. It is clear, though, that “resort to the federal forum should remain available if warranted by a significant change of circumstances.”<sup>1523</sup> The Court has noted that

where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy.<sup>1524</sup>

A dismissal or stay of a federal action is improper unless the concurrent state court action has jurisdiction to adjudicate the claims at issue in the federal suit.<sup>1525</sup>

In *Wilton v. Seven Falls Co.*,<sup>1526</sup> the Supreme Court resolved a conflict among the circuits regarding the standard to be applied by a federal district court in deciding whether to stay a federal court declaratory judgment action in deference to parallel state proceedings. The Court held that

[d]istinct features of the [federal] Declaratory Judgment Act . . . justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the “exceptional circumstances” test of *Colorado River* and *Moses H. Cone*. . . . In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.<sup>1527</sup>

A stay order granted under *Colorado River* abstention is final and immediately appealable.<sup>1528</sup> However, an order refusing abstention under *Colorado River* is “inherently tentative” and is not immediately appealable under the collateral order doctrine.<sup>1529</sup>

#### IV. *Burford* Abstention

Under *Burford* abstention, named after *Burford v. Sun Oil Co.*,<sup>1530</sup> a federal court may abstain when federal relief would disrupt a complex state regulatory scheme and the state's effort to centralize judicial review in a unified state court of special competence.<sup>1531</sup> In *Burford*, the plaintiff sought to enjoin the enforcement of a Texas Railroad Commission order permitting the drilling of some wells on a particular Texas oil field. The order was challenged as a violation of both state law and federal constitutional grounds.<sup>1532</sup> The Texas legislature had established a complex, thorough system of administrative and judicial review of the commission's orders, concentrating all direct review of such orders in the state court of one county.<sup>1533</sup> The state scheme evidenced an effort to establish a uniform policy with respect to the regulation of a matter of substantial local concern. The Court found that "[t]hese questions of regulation of the industry by the state administrative agency ... so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them."<sup>1534</sup>

Thus, where complex administrative procedures have been developed in an effort to formulate uniform state policy, "a sound respect for the independence of state action requires the federal equity court to stay its hand."<sup>1535</sup> Unlike *Pullman* abstention, *Burford* abstention does not anticipate a return to the federal district court. The federal court invoking *Burford* dismisses the action in favor of state administrative and judicial review of the issues, with "ultimate review of the federal questions ... fully preserved" in the Supreme Court.<sup>1536</sup>

In *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*,<sup>1537</sup> the Court clarified that "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy."<sup>1538</sup> It emphasized that the primary concern underlying *Burford* abstention is the avoidance of federal court disruption of "the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'"<sup>1539</sup>

The Court in *NOPSI* stated that under the *Burford* doctrine,

[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult

questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”<sup>1540</sup>

The Supreme Court has held that the federal court’s power to dismiss or remand based on *Burford* abstention exists only where the relief sought is equitable or otherwise discretionary in nature.<sup>1541</sup> When *Burford* is invoked in an action for damages, the district may only stay, not dismiss, the federal suit.<sup>1542</sup>

## V. Domestic Relations Doctrine

The “domestic relations” doctrine generally prohibits federal court adjudication of a domestic relations matter, such as child custody, child support, or alimony.<sup>1543</sup> Whether this doctrine applies to § 1983 constitutional claims is unclear. In fact, federal courts have routinely adjudicated the constitutionality of state policies pertaining to family law matters.<sup>1544</sup>

## VI. Tax Injunction Act

The Tax Injunction Act prohibits federal courts from interfering with state and local tax collection, so long as the state provides a “plain, speedy, and efficient remedy.”<sup>1545</sup> The Tax Injunction Act “is a jurisdictional bar that is not subject to waiver, and the federal courts are duty-bound to investigate the application of the Tax Injunction Act regardless of whether the parties raise it as an issue.”<sup>1546</sup>

In *Hibbs v. Winn*,<sup>1547</sup> the Supreme Court held that the Tax Injunction Act does not apply to a constitutional challenge to a state tax credit policy because such a claim does not interfere with the collection of state taxes. In *Levin v. Commerce Energy, Inc.*,<sup>1548</sup> however, the Supreme Court read *Hibbs* narrowly, and held that comity precludes a federal court action by one business entity contesting allegedly discriminatory state policies granting tax credits to competitive businesses. The plaintiff, a local natural gas distribution company (LDC) which owns and operates networks of distribution pipelines to transport and deliver gas to consumers, alleged in its federal court complaint that Ohio’s discriminatory granting of tax exemptions to competitor companies (independent marketers that do not own or operate their own distribution pipelines, and use LDC company pipelines)

was unconstitutional. The LDC sought injunctive and declaratory relief invalidating these tax exemptions.

Even though the plaintiff's claims sought to *increase* state taxation, the suit was barred by the comity doctrine applicable in state taxation cases. The Court found that the broader principle of comity—which predated the enactment of the Tax Injunction Act in 1937, survived its enactment, and has been applied by the Supreme Court after its enactment—“has particular force when lower federal courts are asked to pass on the constitutionality of state taxation on commercial activity.”<sup>1549</sup> Because the suit was barred by comity, the Court did not have to decide whether the suit was barred by the Tax Injunction Act. The Court distinguished *Hibbs*:

First, [the Levin plaintiffs] seek federal court review of *commercial* matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny. Second, while [plaintiffs] portray themselves as third-party challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position. Third, the Ohio courts are better positioned than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the [Tax Injunction Act] does not constrain their remedial options. Individually, these considerations may not compel forbearance on the part of federal district courts; in combination, however, they demand deference to the state adjudicative process.<sup>1550</sup>

## 22. Monetary Relief

Section 1983 authorizes the imposition of liability “in an action at law, suit in equity, or other proper proceeding for redress . . . .” The full range of common-law remedies “at law” and “in equity” is available to a plaintiff asserting a claim under § 1983. Legal relief may take the form of nominal, compensatory, and punitive damages. Claims for damages may raise a large range of issues, including limitations on the right to recover punitive damages, the validity of release-dismissal agreements, the right to indemnification, and limitations on prisoner remedies in the Prison Litigation Reform Act. The various issues pertaining to monetary relief are discussed in the subsections below.

### I. Nominal and Compensatory Damages

“When § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”<sup>1551</sup> The Supreme Court has pointed out, however, that “[t]he rule of damages . . . is a federal rule responsive to the need whenever a federal right is impaired.”<sup>1552</sup>

Compensatory damages generally fall into one of two categories: special or general. Special damages relate to specific pecuniary losses, such as lost earnings, medical expenses, and loss of earning capacity. General damages include compensation for physical pain and suffering, as well as emotional distress.<sup>1553</sup> Nominal damages are awarded for the violation of a right with no proven actual injury.

In *Carey v. Piphus*<sup>1554</sup> and *Memphis Community School District v. Stachura*,<sup>1555</sup> the Supreme Court held that compensatory damages for a constitutional violation under § 1983 must be based on proof of the actual injuries suffered by the plaintiff. In both cases, the Court ruled that when a § 1983 plaintiff suffers a violation of constitutional rights, but no actual injuries, she is entitled to an award of only \$1 in nominal damages.<sup>1556</sup>

In *Carey*, the Court held that “although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”<sup>1557</sup> Thus, actual damages will not be

presumed in a procedural due process case and, without proof of damages, the plaintiff will be entitled only to “nominal damages not to exceed one dollar.”<sup>1558</sup> The Court noted that the primary purpose of the damages remedy in § 1983 litigation is “to compensate persons for injuries caused by the deprivation of constitutional rights.”<sup>1559</sup> Actual damages caused by a denial of procedural due process may be based on either the emotional distress caused by the denial of fair process, or by an unjustifiable deprivation of liberty or property attributable to lack of fair process.<sup>1560</sup>

In *Stachura*, the Court extended its holding in *Carey* to the violation of a plaintiff’s First Amendment rights. It held that “damages based on the abstract ‘value’ or ‘importance’ of constitutional rights are not a permissible element of compensatory damages” in § 1983 cases.<sup>1561</sup> The problem was that the district court’s jury instructions allowed for an award of damages that was neither compensatory nor punitive, but was based solely on the perceived “value” or “importance” of the particular constitutional right violated.<sup>1562</sup> The Court distinguished the line of common-law voting rights cases awarding presumed damages “for a nonmonetary harm that cannot easily be quantified.”<sup>1563</sup> Thus, while presumed damages ordinarily will not be available in § 1983 actions, presumed damages may be appropriate “[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish.”<sup>1564</sup> A model jury instruction for § 1983 compensatory damages is in the Appendix (*see infra* Model Instruction 7).

#### A. Causation

Common-law tort proximate cause principles apply to compensatory damages under § 1983. Therefore, “[a] successful § 1983 plaintiff . . . must establish not only that a state actor violated his constitutional rights, but also that the violation *caused* the plaintiff injury or damages.”<sup>1565</sup> The district court should include this proximate cause principle in its instructions concerning compensatory damages.<sup>1566</sup>

Under the common-law “eggshell skull” doctrine, which applies in § 1983 actions, a “tortfeasor takes his victim as he finds him, and if a special vulnerability [e.g., a thin skull] leads to an unusually large loss, the wrong doer is fully liable.”<sup>1567</sup>

#### B. Rule Against Double Recovery

Section 1983 complaints frequently assert multiple constitutional claims against multiple defendants. Under the “rule against double



recovery” the plaintiff is entitled to be made whole and compensated once for her injuries.<sup>1568</sup> The district court’s instructions and verdict form should guard against duplicative recovery by stressing that the jury “may not compensate [plaintiff] twice for any [injuries] she might have suffered.”<sup>1569</sup>

### C. Duty to Mitigate Damages

Like common-law tort plaintiffs, § 1983 plaintiffs are required to take reasonable steps to mitigate their damages.<sup>1570</sup> The burden is on the defendant to show that the plaintiff has not mitigated her damages.<sup>1571</sup> The question is one of fact for the jury.<sup>1572</sup>

## II. Punitive Damages

In *Smith v. Wade*,<sup>1573</sup> the Supreme Court held that a § 1983 plaintiff may recover punitive damages against an official in her personal capacity if the official acted with malicious or evil intent or in callous disregard of the plaintiff’s federally protected rights.<sup>1574</sup> “Although the specific intent to violate plaintiff’s federally protected right will support a punitive damages award, ‘reckless indifference’ towards a plaintiff’s federally protected right also suffices to authorize liability for punitive damages under § 1983.”<sup>1575</sup> The *Smith* standard does not require a showing that the defendant engaged in “egregious” misconduct.<sup>1576</sup> The majority view in the courts of appeals is that punitive damages may be awarded even when the plaintiff recovers only nominal damages.<sup>1577</sup> If a reasonable jury could find that the defendant acted with malice or callous indifference, the district judge should submit the issue of punitive damages to the jury under proper instructions.<sup>1578</sup> The courts in § 1983 cases hold that the burden is on the defendant to introduce evidence of his financial circumstances.<sup>1579</sup> When there are multiple defendants the district court should clearly instruct the jury “that each individual defendant’s actions and fault must serve as the basis for fashioning an appropriate punitive damages award.”<sup>1580</sup>

In *City of Newport v. Fact Concerts, Inc.*,<sup>1581</sup> the Supreme Court held that punitive damages cannot be awarded against a municipal entity. The Court found that municipal entities are immune from punitive damages under § 1983. Nor may punitive damages be awarded under § 1983 against a state entity. Eleventh Amendment state sovereign immunity bars a federal court award of punitive damages payable out of the state treasury.<sup>1582</sup> Further-

more, states and state entities are not suable “persons” within the meaning of § 1983.<sup>1583</sup>

The district court is authorized to review a jury award of punitive damages under common-law principles to determine whether it is so high as to shock the judicial conscience,<sup>1584</sup> as well as under substantive due process to determine whether the amount of the award is “grossly excessive.”<sup>1585</sup> The First Circuit observed that “[c]ourts rarely apply the common law excessiveness standard to punitive damages these days, since aggrieved defendants now commonly invoke the arguably stricter due process standard.”<sup>1586</sup>

Supreme Court decisional law holds that “grossly excessive” punitive damage awards violate substantive due process.<sup>1587</sup> To determine whether the award is “grossly excessive,” consideration must be given to (1) the degree of reprehensibility of the defendant’s conduct—the most important factor; (2) the ratio between the harm or potential harm to the plaintiff and the punitive damages award; and (3) the disparity between the punitive damages award and civil penalties authorized or imposed in comparable cases.<sup>1588</sup> “[I]n practice, few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>1589</sup> However, a larger ratio “may comport with due process when a particularly egregious act has resulted in only a small amount of economic damages.”<sup>1590</sup>

In *Phillip Morris USA v. Williams*,<sup>1591</sup> the Supreme Court held that due process prohibits a punitive damages award that punishes the defendant for injuries inflicted by the defendant upon nonparties. It acknowledged, however, that the defendant’s infliction of harm upon others may be relevant in assessing the reprehensibility of the defendant’s conduct. “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. . . .”<sup>1592</sup> The Court said that trial judges must take steps—presumably the issuance of proper jury instructions—designed to ensure that the defendant’s other wrongs are considered solely on the issue of reprehensibility, and are not relied on by the jury to punish the defendant directly.

In the author’s view, it is questionable whether the trial court will be able to formulate an effective instruction to carry out this goal because it seems unlikely that the jury will be able to comprehend how the defen-

dant's other wrongs may be considered in evaluating the reprehensibility of his conduct, but not in determining the amount of punitive damages.<sup>1593</sup> Furthermore, because one of the purposes of punitive damages is to deter unlawful conduct, it would seem that the jury should know whether the defendant has engaged in similar wrongdoing in the past. In other words, higher punitive damages are more likely to be necessary to deter a repeat offender than an isolated wrongdoer. The Supreme Court's punitive damages substantive due process principles apply in § 1983 actions.<sup>1594</sup> A model jury instruction for a § 1983 claim for punitive damages is in the Appendix (*see infra* Model Instruction 8).

### III. Release-Dismissal Agreements

Section 1983 damage claims may be settled, waived, or released. The validity of a settlement, waiver, or release of a § 1983 claim depends on whether it is voluntary, informed, and not contrary to public policy.<sup>1595</sup> A recurring issue in § 1983 actions concerns the validity of "release-dismissal agreements" pursuant to which law enforcement authorities agree to dismiss criminal charges in exchange for the release of § 1983 claims. In *Town of Newton v. Rumery*,<sup>1596</sup> the Supreme Court held that these agreements are not automatically invalid. Rather, the validity of a release-dismissal agreement should be evaluated on a case-by-case basis to determine whether the agreement (1) was voluntary, (2) was the product of prosecutorial overreaching or other misconduct, and (3) adversely affects the public interest.

### IV. Indemnification

An important issue in many § 1983 cases is whether the relevant governmental entity will indemnify the defending official for her monetary liability. Indemnification is not covered by federal law; it is strictly a matter of state or local law.<sup>1597</sup> Some of the issues that may arise in federal court § 1983 actions are whether there is supplemental jurisdiction over the indemnification claim and, if so, whether the federal court should exercise that jurisdiction;<sup>1598</sup> the meaning and application of state indemnification law;<sup>1599</sup> and whether the jury should be informed about indemnification. Although most courts hold that indemnification is akin to insurance, and should be shielded from the jury,<sup>1600</sup> the author believes that it is better to inform jurors about the reality of indemnification.<sup>1601</sup>

## V. Prison Litigation Reform Act

In any action involving prisoners' rights, there are likely to be substantial limitations placed on the availability and scope of the remedies sought. Although a comprehensive discussion of the various provisions of the Prison Litigation Reform Act (PLRA) is beyond the scope of this monograph, the importance of consulting the Act in appropriate cases cannot be overemphasized. For example, the PLRA precludes the bringing of a civil action by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury."<sup>1602</sup> Exhaustion of administrative remedies is required in actions relating to prison conditions.<sup>1603</sup> The availability of attorneys' fees for prevailing prisoners is significantly restricted.<sup>1604</sup> Injunctive relief in prison reform litigation must be narrowly drawn to remedy violations of federal rights.<sup>1605</sup> Government officials may seek the immediate termination of all prospective relief that was awarded or approved before the enactment of the PLRA "in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right."<sup>1606</sup>

In *Brown v. Plata*,<sup>1607</sup> the Supreme Court, 5–4, upheld orders of three-judge federal courts, after extensive litigation, requiring California to release as many as 46,000 prisoners to remedy severe, ongoing systemic constitutional violations, specifically, denial of adequate medical and mental health care attributable to severe and exceptional overcrowding in California prisons.

The order leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—the State will be required to release some number of prisoners before their full sentences have been served.<sup>1608</sup>

The order does not require the actual release of prisoners; California may increase its prison capacity or transfer prisoners to other facilities, including in other states.

Some of the important PLRA provisions at issue in *Brown*, which the Court found satisfied, are:

1. Under the PLRA, only a three-judge court may issue an order limiting a prison population. 18 U.S.C. § 3626 (a)(3)(B). Before a panel may be convened, the court must find, *inter alia*, that an order for less intrusive relief failed to remedy the constitutional violation.
2. A remedy shall extend no further than necessary to remedy the violation of the federal rights of the plaintiff(s), shall be narrowly drawn, and is the least intrusive means necessary to correct the violation of the federal right. 18 U.S.C. § 3626(a)(1)(A).
3. To support a prison population reduction order, the court must find by clear and convincing evidence that overcrowding is the primary cause of the violation of a federal right, and no other relief will remedy the violation. 18 U.S.C. § 3626(a)(3)(E)(i)(ii).

The Court stressed that overcrowding need only be the “primary cause” of a constitutional violation, meaning that it “need only be the foremost, chief, or principal cause of the violation”; it need not be the “only cause.”<sup>1609</sup> The Court also emphasized that the federal courts have the responsibility and broad equitable powers to remedy constitutional violations.<sup>1610</sup> It found that the extensive and ongoing violations of prisoners’ constitutional rights require a remedy, and the remedy will not be achieved without a reduction in overcrowding.

## 23. Attorneys' Fees<sup>1611</sup>

### I. Section 1988 Fee Litigation

The Civil Rights Attorney's Fees Awards Act of 1976<sup>1612</sup> authorizes courts, in their discretion, to award reasonable attorneys' fees to the prevailing party in a § 1983 action. Section 1988 fees serve "an important public purpose by making it possible for persons without means to bring suit to vindicate their rights."<sup>1613</sup> Section 1983 fees are thus an "integral part" of § 1983 remedies.<sup>1614</sup>

The Supreme Court has admonished the lower federal courts that a "request for [§ 1988(b)] attorney's fees should not result in a second major litigation."<sup>1615</sup> Nevertheless, § 1988(b) fee disputes often do result in a "second major litigation."<sup>1616</sup> Fee litigation "can turn a simple civil case into two or even more cases—the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum or at least ad nauseam."<sup>1617</sup> As a federal district judge lamented, the goal of avoiding a second major litigation

has proved a somewhat pious and forlorn hope. In view of the complexities the Supreme Court and the lower courts have grafted onto the fee calculation process, federal courts are today enmeshed in an inordinately time consuming and ultimately futile search for a fee that reflects market forces in the absence of a relevant market.<sup>1618</sup>

### II. Prevailing Parties

#### A. Prevailing Plaintiffs Presumptively Entitled to Fees

Section 1988(b) authorizes a fee award to a "prevailing party." "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant."<sup>1619</sup> Whether a party is a prevailing party is a question of law for the court.<sup>1620</sup> Courts interpret the § 1988 fee-shifting statute to mean that attorneys' fees should be awarded to a prevailing plaintiff almost as a matter of course.<sup>1621</sup> Fees should be denied to a prevailing plaintiff only when "special circumstances" would make a fee award

unjust.<sup>1622</sup> The fiscal impact of a fee award upon a municipality,<sup>1623</sup> defendant's good faith,<sup>1624</sup> and the fact the fees will ultimately be paid by taxpayers<sup>1625</sup> have all been held not to be "special circumstances" justifying either a denial or reduction of fees. However, some decisions have held that a plaintiff's grossly inflated fee application may be a special circumstance justifying the denial of fees.<sup>1626</sup>

B. Double Standard: Prevailing Defendants Presumptively Not Entitled to Fees

Prevailing defendants are entitled to attorneys' fees only when the plaintiff's action was "frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so."<sup>1627</sup> Although "attorney's fees should rarely be awarded against [pro se] § 1983 plaintiffs," the district court has discretion to do so.<sup>1628</sup> In most cases the district court's failure to give adequate reasons or explanation for awarding fees to a defendant is an abuse of discretion necessitating a remand.<sup>1629</sup>

The Supreme Court held that when a § 1983 complaint asserts both frivolous and nonfrivolous claims, the court may award fees to the prevailing defendant, but only for the fees that the defendant would not have incurred but for the frivolous claims.<sup>1630</sup> The critical question in computing the defendant's fees in these circumstances is whether the defendant's fees "would have been incurred in the absence of the frivolous allegation."<sup>1631</sup>

C. Plaintiff Must Obtain Some Judicial Relief

The plaintiff will be considered a prevailing party when he succeeds on "any significant issue" that achieves some of the benefit the plaintiff sought in bringing suit.<sup>1632</sup> To be a prevailing party, the plaintiff must obtain some judicial relief as a result of the litigation; the mere fact that the court expressed the view that the plaintiff's constitutional rights were violated does not qualify the plaintiff as a prevailing party.<sup>1633</sup> The mere fact that the plaintiff prevailed on a procedural issue during the course of the litigation, such as by obtaining an appellate decision granting a new trial, also does not qualify the plaintiff as a prevailing party.<sup>1634</sup> "[A] plaintiff 'prevails' when actual relief on the merits of [the plaintiff's] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."<sup>1635</sup>

In *Farrar v. Hobby*,<sup>1636</sup> the Supreme Court held that a § 1983 plaintiff who recovers only nominal damages is nevertheless a prevailing party eligible to recover attorneys' fees under § 1988(b); but usually a reasonable fee in these circumstances is either no fees or very low fees. In determining whether to award fees to a plaintiff who recovered only nominal damages, Justice O'Connor's concurring opinion in *Farrar* urged courts to consider the difference between the damages sought and the damages recovered, the significance of the legal issues on which the plaintiff claims to have prevailed, and the public purpose served by the litigation.<sup>1637</sup> The lower federal courts have generally relied on O'Connor's concurrence in evaluating the fee issue in nominal damages cases.<sup>1638</sup>

A plaintiff who asserts a § 1983 claim that is not insubstantial, and obtains relief on a "pendent" (i.e., "supplemental") state law claim is a prevailing party eligible for fees under § 1988, even though the § 1983 claim is not decided on the merits.<sup>1639</sup> The plaintiff, however, is not entitled to fees if the § 1983 claim is insubstantial,<sup>1640</sup> or if the court in fact decides the merits of the plaintiff's constitutional claim adverse to the plaintiff.<sup>1641</sup>

The plaintiff may be a prevailing party even if she did not prevail on all of her claims. In *Hensley v. Eckerhart*,<sup>1642</sup> the Supreme Court held that when the plaintiff prevails on some, but not all, claims arising out of common facts, the results obtained determine whether the fees should be reduced because of lack of complete success. The Court said that in determining the amount of the fee award, "the most critical factor is the degree of success obtained."<sup>1643</sup> The Court also ruled that when the plaintiff prevails on some, but not all, claims that are not interrelated, the plaintiff should be awarded fees only for the successful claims.<sup>1644</sup> However, when the successful and unsuccessful claims are interrelated, the district court should focus on the overall results achieved. If the plaintiff achieved "excellent results," she should recover a full compensatory fee award. If the plaintiff achieved "only partial or limited success," the district court should consider whether the lodestar fee amount (reasonable hours multiplied by reasonable rates) is excessive. The district court should award only the amount of fees that is "reasonable in relation to the results obtained."<sup>1645</sup>



In *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*,<sup>1646</sup> the Supreme Court held that the fact that the lawsuit was a catalyst in causing the defendant to alter its conduct in relation to the plaintiff does not qualify the plaintiff as a prevailing party. It ruled that to be a “prevailing party,” the plaintiff must secure a favorable judgment on the merits or a court-ordered consent decree. The Court overturned the catalyst doctrine that had been adopted by eleven Circuits and rejected only by the Fourth Circuit. Under *Buckhannon*, only “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.”<sup>1647</sup> Dictum states that private settlements not embodied in a judicial decree will not qualify the plaintiff as a prevailing party because “[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees.”<sup>1648</sup>

*Buckhannon* involved the federal fee-shifting statutes in the Fair Housing Act and Americans with Disabilities Act. However, the lower federal courts have uniformly applied the decision to other civil rights fee-shifting statutes, including 42 U.S.C. § 1988(b).<sup>1649</sup>

*Buckhannon* has generated a great deal of litigation, raising such issues as whether a preliminary injunction or “so ordered” settlement qualifies the plaintiff as a prevailing party.<sup>1650</sup> A “stipulation and order of discontinuance,” combined with court retention of jurisdiction over the settlement for enforcement purposes, may qualify the plaintiff as a prevailing party.<sup>1651</sup>

A pro se plaintiff is not eligible to recover attorneys’ fees, even if the plaintiff is an attorney.<sup>1652</sup> Thus, only a prevailing plaintiff who is represented by counsel is eligible to recover fees.

### III. Computation of Fee Award: Lodestar Adjustment Method

Section 1988(b) provides that a court may award a prevailing party “a reasonable attorney’s fee as part of the costs.” Fees awarded under § 1988 are computed under the “lodestar” method of multiplying reasonable hours by reasonable hourly market rates for attorneys in the community with comparable backgrounds and experience.<sup>1653</sup> There is a “strong presumption” that the lodestar produces a reasonable fee.<sup>1654</sup> The district court may enhance the lodestar for the quality of representation, but only in “rare”

and “exceptional” circumstances.<sup>1655</sup> The underlying goal of a § 1988(b) fee award is to “attract competent counsel.”<sup>1656</sup> The fee applicant must submit “appropriate documentation” to establish entitlement to an award.<sup>1657</sup>

The Supreme Court stressed that, in determining an attorney’s reasonable hours, trial courts “should not[ ] become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney’s time.”<sup>1658</sup>

The “fee applicant has the burden of showing by ‘satisfactory evidence—in addition to the attorney’s own affidavits’—that the requested hourly rates are the prevailing market rates.”<sup>1659</sup>

At a minimum, a fee applicant must provide some information about the attorneys’ billing practices and hourly rate, the attorneys’ skill and experience (including the number of years that counsel has practiced law), the nature of counsel’s practices as it relates to this kind of litigation, and the prevailing market rates in the relevant community.<sup>1660</sup>

The district court may “rely in part on [its] own knowledge of private firm hourly rates in the community.”<sup>1661</sup> The district court may also “consider other rates that have been awarded in similar cases in the same district.”<sup>1662</sup>

Under the “forum” rule there is a presumption in favor of applying the rates of the forum.<sup>1663</sup> To “overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because in doing so would likely produce a substantially better based result.”<sup>1664</sup> The fee applicant may satisfy her burden by showing that local counsel was unable or unwilling to take the case, or that in a case requiring special expertise, “that no in-district counsel possessed such expertise.”<sup>1665</sup>

Paralegal services that contributed to the attorney’s work product may be compensated at “prevailing market rates” rather than the cost of paralegal services incurred by counsel.<sup>1666</sup>

The fee applicant bears the burden of documenting and demonstrating the reasonableness of the hours claimed.<sup>1667</sup> The reasonableness of the hours depends in part on counsel’s expertise.<sup>1668</sup> “A fee applicant cannot demand a high hourly rate—which is based on his or her experience, rep-

utation, and a presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law.”<sup>1669</sup>

The district court should exclude hours that are “excessive, redundant, or otherwise unnecessary.”<sup>1670</sup> “[T]rial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney’s time.”<sup>1671</sup> In some circumstances, fees may be awarded for post-judgment monitoring.<sup>1672</sup> The fee applicant’s failure to exercise proper billing judgment by failing to exclude hours that are excessive, redundant, or otherwise unnecessary may lead the district court to reduce the fee award.<sup>1673</sup>

The Supreme Court has generally disapproved of the use of upward adjustments to the lodestar.<sup>1674</sup> In “rare” and “exceptional” cases, an upward adjustment may be made because of the superior quality of representation<sup>1675</sup> or for “exceptional success.”<sup>1676</sup> Fees may also be adjusted upward to compensate the prevailing party for delay in payment, either by using current market rates rather than historic rates, or by adjusting historic rates to account for inflation.<sup>1677</sup> The lodestar may not be enhanced to compensate for the risk of non-success when the plaintiff’s attorney was retained on a contingency basis.<sup>1678</sup> Nor should the lodestar be enhanced because of the novelty and complexity of a case because these factors are presumably fully reflected in counsel’s billable hours.<sup>1679</sup>

In *City of Riverside v. Rivera*,<sup>1680</sup> the Supreme Court held that the fees awarded need not be proportional to the damages recovered by the plaintiff. The approximately \$245,000 in fees awarded the plaintiff substantially exceeded the \$33,350 in damages he recovered.<sup>1681</sup> “Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief.”<sup>1682</sup>

The fees awarded under § 1988 are not limited to the amount of fees recoverable by counsel pursuant to a contingency fee agreement.<sup>1683</sup> Conversely, the fees collectable under a contingency agreement may exceed the fees awarded under § 1988.<sup>1684</sup>

Fees generally may not be awarded for work performed on administrative proceedings that preceded the § 1983 action, unless those proceedings “contributed directly to the successful outcome in federal court and obviated the need for comparable work in the federal action. . . .”<sup>1685</sup> In addition,

expert witness expenses are not recoverable as part of the § 1988 fee award in § 1983 actions.<sup>1686</sup>

Legal services organizations and other nonprofit organizations are entitled to have fee awards computed on the basis of reasonable market rates rather than on the lower salaries paid to the organization's attorneys.<sup>1687</sup>

#### IV. Other Fee Issues

##### A. Eleventh Amendment Immunity

When prospective relief is awarded against state officials under the doctrine of *Ex parte Young*,<sup>1688</sup> an award of fees payable out of the state treasury is not barred by the Eleventh Amendment.<sup>1689</sup> Further, the Eleventh Amendment does not bar an upward adjustment in the lodestar to compensate for delay in payment.<sup>1690</sup>

##### B. Offer of Judgment

Federal Rule of Civil Procedure 68 provides that “a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money . . . specified in the offer, with costs then accrued.” If the offeree rejects the offer and “the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer.” In *Marek v. Chesny*,<sup>1691</sup> the Supreme Court held that the “costs” referred to in Rule 68 encompass § 1988(b) attorneys’ fees. Therefore, even though the plaintiff was the prevailing party, if the plaintiff did not obtain more favorable relief than he had been offered under Rule 68, he may not recover from the defendant any § 1988(b) fees that accrued after the rejected offer of judgment.<sup>1692</sup>

The Court in *Marek* emphasized that if the defendant intends his Rule 68 offer of judgment to cover “costs,” that is, § 1988 attorneys’ fees, the offer must clearly say so. The Court stated:

If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include as its judgment an additional amount which in its discretion, it determines to be sufficient to cover the costs.<sup>1693</sup>

*Marek* did not address whether a defendant who makes a successful Rule 68 offer is entitled to § 1988 fees that accrued after the date of the offer. The great weight of lower court authority holds that although Rule 68 authorizes an award of post-offer “costs” to the defendant, these costs do not include § 1988 fees to a nonprevailing defendant.<sup>1694</sup>

C. Settlement of Merits and Fees

In *Evans v. Jeff D.*,<sup>1695</sup> the Supreme Court held that an offer by a defendant to settle the plaintiff’s claim on the merits and the claim for fees simultaneously is not necessarily unethical. The Court said that a claim for § 1988 fees belongs to the party, not to her attorney,<sup>1696</sup> and is considered part of “the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney’s fees.”<sup>1697</sup>

D. Explanation of Fee Determination

Finally, “[i]t is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination” in order to allow for meaningful appellate review.<sup>1698</sup>



# Notes

## Chapter 1: Introduction to § 1983 Litigation, p. 1

1. 42 U.S.C. § 1983 (1996).
2. *See, e.g.,* L.A. Cnty. v. Humphries, 131 S. Ct. 447, 451–53 (2010) (legislative history of § 1983 supports conclusion that municipality may be subject to prospective relief only when violation of federal rights is attributable to enforcement of municipal policy or practice); Will v. Mich. Dep’t of State Police, 491 U.S. 58, 66–71 (1989) (states and state agencies are not suable “persons”); Patsy v. Bd. of Regents, 457 U.S. 496, 501–02 (1982) (exhaustion of state remedies not required under § 1983); Quern v. Jordan, 440 U.S. 332, 341–42 (1979) (Congress enacted original version of § 1983 pursuant to § 5 of Fourteenth Amendment but did not intend to override Eleventh Amendment); Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690–91 (1978) (municipalities are suable persons under § 1983 but not on basis of respondeat superior liability); Monroe v. Pape, 365 U.S. 167, 170–71 (1961) (§ 1983 provides federal remedy independent of state law remedies and is available even when state official acted in violation of state law), *rev’d on other grounds*, Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978).
3. 365 U.S. 167 (1961), *rev’d on other grounds*, Monell, 436 U.S. 658.
4. *Monroe*, 365 U.S. at 173–74.
5. *Id.* at 186.
6. *Id.* at 187.
7. *Id.* at 183–87.
8. *Id.* at 180.
9. *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978). *See also* *Wyatt v. Cole*, 504 U.S. 158, 161 (1992); *Hardin v. Straub*, 490 U.S. 536, 539 (1989); *Burnett v. Grattan*, 468 U.S. 42, 53 (1984).
10. *See* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).
11. 436 U.S. 658 (1978).
12. *See infra* Chapter 11. The Supreme Court recently reaffirmed *Monell* and held that its rejection of respondeat superior and the requirement that the violation of plaintiff’s federal rights be attributable to enforcement of a municipal policy or practice is not limited to claims for damages, and applies also to claims for prospective relief. *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 451–54 (2010).
13. 547 U.S. 586 (2006).
14. *Id.* at 597–98.
15. *Id.* (citing Michael Avery, David Rudovsky, & Karen Blum, *Police Misconduct: Law and Litigation*, p. v (3d ed. 2005)).
16. *Id.* at 597–98.
17. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

18. See generally *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984). For an extensive analysis of § 1988 attorney’s fees, see 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Statutory Attorney’s Fees* (4th ed. 2014).

19. Pretrial discovery is governed by Fed. R. Civ. P. 26–37.

20. See *infra* Chapter 16, § IV.D.b.

21. *Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996) (quoting Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 Brook. L. Rev. 285, 309 (1993)).

22. See *infra* Chapter 16, § IV.D.b. On the other hand, to determine whether the plaintiff has alleged a “plausible” § 1983 claim, the Supreme Court has directed the districts *not* to consider whether they may be able to carefully manage discovery. See *infra* Chapter 3, § III.C.

23. Application of privileges in § 1983 litigation is covered in detail in 3 Martin A. Schwartz, *Section 1983 Litigation: Federal Evidence*, Chs. 7 & 8 (5th ed. 2014).

24. See, e.g., *In re City of N.Y.*, 607 F.3d 923, 945 (2d Cir. 2010).

25. *Chauffers Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990).

26. *Id.*

27. In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 707–22 (1999), the Court held that there is a right to a jury trial on a § 1983 regulatory taking claim. The decision, however, strongly supports the right to a jury trial in all § 1983 federal court actions for monetary relief in excess of \$20. *Id.* at 709–11. See 1B Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 16.02[*I*] (4th ed. 2014).

The Seventh Amendment guarantees the right to a jury trial on a federal court claim for *punitive damages*. *Jones v. UPS, Inc.*, 674 F.3d 1187, 1202–06 (10th Cir.) (non-§ 1983), *cert. denied*, 133 S. Ct. 413 (2012).

28. *Burt v. Abel*, 585 F.2d 613, 616 n.7 (4th Cir. 1978).

29. *Wilson v. Bailey*, 934 F.2d 301, 306 (11th Cir. 1991) (§ 1983 injunctive and declaratory relief not triable by jury).

30. See generally *Dairy Queen v. Wood*, 369 U.S. 469, 472–73 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500, 510–11 (1959).

31. For an extensive compilation of § 1983 instructions with commentary and annotations, see 4 Martin A. Schwartz & George C. Pratt, *Section 1983 Litigation: Jury Instructions* (2d ed. 2014).

32. *Noel v. Artson*, 641 F.3d 580, 587 (4th Cir.), *cert. denied*, 132 S. Ct. 516 (2011).

33. *Id.* at 590.

34. See, e.g., *Clem v. Lomeli*, 566 F.3d 1177, 1181 (9th Cir. 2009). See also *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005).

35. *Cotts v. Osafo*, 692 F.3d 564, 568 (7th Cir. 2012).

36. *Id.* at 569.

## Chapter 2: Constitutional Claims Against Federal Officials: The *Bivens* Doctrine, p. 7

37. See *infra* Chapter 3, § I, and Chapter 7.

38. *Id.*

39. *District of Columbia v. Carter*, 409 U.S. 418, 424–25 (1973).

40. 403 U.S. 388 (1971).



41. *FDIC v. Meyer*, 510 U.S. 471, 484–85 (1994). *See also* *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009).

42. 442 U.S. 228 (1979).

43. The plaintiff in *Davis* asserted a gender discrimination claim against Congressman Passman.

44. *Bivens*, 403 U.S. at 395. *Accord* *Davis*, 442 U.S. at 245.

45. *Bivens*, 403 U.S. at 410 (“damages or nothing”) (Harlan, J., concurring); *Davis*, 442 U.S. at 245.

46. *Davis*, 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 396).

47. 446 U.S. 14 (1980).

48. *Carlson*, 446 U.S. at 18–12.

49. 462 U.S. 367 (1983).

50. *Id.* at 372.

51. 462 U.S. 296 (1983).

52. 483 U.S. 669 (1987).

53. 487 U.S. 412 (1988).

54. *Id.* at 421–29.

55. 510 U.S. 471 (1994).

56. 534 U.S. 61 (2001).

57. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (describing rationale of *Meyer*).

58. 551 U.S. 537 (2007).

59. *See also* *Hui v. Castaneda*, 130 S. Ct. 1845 (2010) (holding federal statute made Federal Tort Claims Act exclusive remedy for claims against U.S. health service personnel, thereby precluding *Bivens* claims against these officials).

60. 132 S. Ct. 617 (2012).

61. The Court found that California tort law, which reflects general tort law principles, provided an adequate alternative remedy. *Minneci*, 132 S. Ct. at 625. Although state tort remedies have limitations, so does the *Bivens* remedy. For example, Eighth Amendment *Bivens* claims asserted by prisoners (1) require a showing of deliberate indifference, not mere negligence; (2) can’t be based on respondeat superior liability; and (3) “ordinarily may not seek damages for mental or emotional injury unconnected with physical injury.” *Id.* To justify rejection of the *Bivens* remedy, state-law remedies and the *Bivens* remedy “need not be perfectly congruent.” *Id.* The Court, however, left open the possibility that it may imply a *Bivens* remedy if there are greater disparities between the *Bivens* and state law claim than the disparities in *Minneci*. *Id.* at 626.

62. The only difference between *Carlson* and *Minneci* is that the defendants in *Carlson* were federal governmental prison officials, whereas the defendants in *Minneci* were employees of a privately operated federal prison. While the Court in *Carlson* stated that remedies for constitutional violations should not “be left to the vagaries of the law of the states,” *Carlson*, 446 U.S. at 23, the Court in *Minneci* did just that, holding that the availability of state common law tort remedies justified rejection of the *Bivens* remedy.

63. *Minneci*, 132 S. Ct. at 621 (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

64. *Id.*

65. *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc) (noting Supreme Court has not created another *Bivens* claim in 32 years since *Carlson*, and “has reversed more than a dozen appellate decisions that had created new actions for damages. Whatever presumption in favor of a *Bivens*-like remedy may have once existed has long since been abrogated.”). *See also* *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (assuming, without deciding, that *Bivens* doctrine extends to First Amendment claims); *Reichle v. Howard*, 132 S. Ct. 2088, 2093 N.Y. (2012) (observing that Supreme Court has never extended *Bivens* doctrine to First Amendment claims).

66. 556 U.S. 662 (2009).

67. *Id.* at 675 (2009) (quoting *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006)).

68. *Ellis v. Blum*, 643 F.2d 68, 84 (2d Cir. 1981).

69. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.20 (1982).

70. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

71. *See, e.g., Wood v. Moss*, 134 S. Ct. 2056 (2014); *Reichle v. Howards*, 132 S. Ct. 2088 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Anderson v. Creighton*, 483 U.S. 635 (1987).

72. *Heck v. Humphrey*, 512 U.S. 477 (1994).

73. *See infra* Chapter 16.

74. *See, e.g., Tavaréz v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995).

75. *See infra* Chapter 17.

76. *Chin v. Bowen*, 833 F.2d 21, 23–24 (2d Cir. 1987). *Accord* *Bieneman v. City of Chi.*, 864 F.2d 463, 469 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989).

77. *See infra* Chapter 20.

78. *Carlson*, 446 U.S. at 21–22.

### Chapter 3: Section 1983: Elements of Claim, Functional Role, Pleading, and Jurisdiction, p. 12

79. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). If a § 1983 complaint “does not state a constitutional claim it is subject to dismissal under Rule 12(b)(6) [for failure to state a proper cause of action], not Rule 12(b)(1),” for lack of subject-matter jurisdiction. *Doe v. Metro. Police Dep’t*, 445 F.3d 460, 467 (D.C. Cir. 2006).

80. *See* *Sumnum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002) (referring to four elements of § 1983 claim) (citing 1 Martin Schwartz, *Section 1983 Litigation: Claims and Defenses*, § 1.4 at 12 (3d ed. 1997)).

81. *See infra* Chapter 11.

82. *Valance v. Wisel*, 110 F.3d 1269, 1278–79 (7th Cir. 1997); *Larez v. Holcomb*, 16 F.3d 1513, 1517–18 (9th Cir. 1994); *Ruggiero v. Krzeminski*, 928 F.2d 558, 562 (2d Cir. 1991); *Shaw v. Leatherberry*, 706 N.W. 2d 299, 304 (Wis. 2005). *See also* *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006) (requiring plaintiff to plead and prove “absence of probable cause” as an element of a *Bivens* First Amendment retaliatory prosecution claim); *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (rejecting imposition of “clear and convincing evidence” burden on plaintiffs who assert wrongful motive claim subject to qualified immunity defense raised on summary judgment); *Am. Fed’n of State, Cnty. & Mun. Emps. v. Scott*, 717 F.3d 851, 880

(11th Cir. 2013) (plaintiff bears burden of persuasion on every element of § 1983 claim); *Clark v. Mann*, 562 F.2d 1104, 1117 (8th Cir. 1977) (§ 1983 plaintiffs “ordinarily retain the burden of proof throughout the trial”). *See generally* *Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (Individuals with Disabilities Education Act action) (referring to “default rule” that “plaintiffs bear the burden of persuasion regarding the essential aspects of their claims”).

83. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled on other grounds by* *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

84. *Parratt*, 451 U.S. at 534.

85. *Daniels*, 474 U.S. at 328–30. *See also* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–55 (1998); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986). *See also infra* Chapter 5, § IV.

86. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (race); *Washington v. Davis*, 426 U.S. 229, 240–42 (1976) (race); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (gender).

87. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

88. *Id.*

89. *See* *Wilson v. Garcia*, 471 U.S. 261, 273 (1985). *See infra* Chapter 5.

90. *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Graham v. Connor*, 490 U.S. 386, 393–94 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (§ 1983 “creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere”); *Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979).

91. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989); *Johnson v. City of Shelby*, 743 F.3d 59 (5th Cir. 2013); *Wax ’n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000); *Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 732 n.3 (7th Cir. 1994); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Santiago v. N.Y. State Dep’t of Corr. Servs.*, 945 F.2d 25, 30–31 (2d Cir. 1991); *Tarp-ley v. Greene*, 684 F.2d 1, 9–11 (D.C. Cir. 1982); *Pauk v. Bd. of Trustees of City Univ. of N.Y.*, 654 F.2d 856, 865 (2d Cir. 1981).

92. 491 U.S. 701, 731–34 (1989).

93. *See, e.g., McCormick v. Miami Univ.*, 693 F.3d 654, 658–61 (6th Cir. 2012) (and cases cited therein) (§ 1983 exclusive remedy to enforce § 1981 against state actors in either official or individual capacity suits).

94. 550 U.S. 544 (2007).

95. 556 U.S. 662 (2009).

96. *Erickson*, 551 U.S. 89 (2007) (prisoner complaint asserting Eighth Amendment medical treatment claim satisfied notice pleading standard); *Kikumura v. Osagie*, 461 F.3d 1269, 1294 (10th Cir. 2006) (prisoner Eighth Amendment deliberate indifference medical treatment claim: plaintiff “is merely required to provide ‘a short and plain statement’ of his Eighth Amendment claims, Fed. R. Civ. P. 8(a), and ‘[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally’ in the complaint, Fed. R. Civ. P. 9(b)”); allegations that defendant “knew” that plaintiff “require[d] prompt medical attention and . . . that delay would exacerbate [his] health problem,” but deliberately “disregarded that risk” “satisfied ‘pleading requirement of Rule 8(a) for the subjective component of a deliberate indifference claim’”).

97. 507 U.S. 163 (1993).

98. *Id.* at 164.

99. *Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 252 (4th Cir. 2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

100. 534 U.S. 506 (2002).

101. *See Erickson*, 551 U.S. at 93–94; *Jones v. Bock*, 549 U.S. 199, 212–13 (2007); *Hill v. McDonough*, 547 U.S. 573, 583 (2006); *Educadores Puertorriqueños en Accion v. Hernandez*, 367 F.3d 61, 66–67 (1st Cir. 2004); *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002). The Court in *Leatherman*, however, left open whether a heightened pleading standard applies to claims asserting individual liability, specifically personal-capacity claims in which officials may assert the affirmative defense of qualified immunity. Applying the rationale of *Leatherman* and *Swierkiewicz*, the majority of courts of appeals held that, like other § 1983 claims, the notice pleading standard applies to personal-capacity claims subject to qualified immunity. As discussed in this section, *infra*, claims subject to qualified immunity are now subject to the plausibility standard.

102. 550 U.S. 544 (2007).

103. *Id.* at 555.

104. *Id.*

105. *Id.* at 559 (citing Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. Rev. 635–38 (1989)).

106. 355 U.S. 41 (1957).

107. *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46).

108. *Id.* at 563.

109. *Id.* at 570.

110. 551 U.S. 89 (2007).

111. *Id.* at 94.

112. The Court in *Erickson* noted that the complaint also included other, more specific factual allegations.

113. *Erickson*, 551 U.S. at 94 (quoting *Estelle*, 429 U.S. at 106).

114. The circuit courts rather consistently applied *Twombly* to § 1983 claims. *See, e.g., Alvarado Aguilera v. Negron*, 509 F.3d 50, 53 (1st Cir. 2007); *Estate of Sims v. Cnty. of Bureau*, 506 F.3d 509, 512 (7th Cir. 2007); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007); *Stevenson v. Carroll*, 495 F.3d 62, 66 (3d Cir. 2007) (plaintiffs “have met their obligation to provide grounds for their entitlement to relief by presenting factual allegations sufficient to raise their right to relief above a speculative level”), *cert. denied*, 128 S. Ct. 1223 (2008).

115. 556 U.S. 662 (2009).

116. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

117. For detailed complaint allegations, see *infra* text accompanying notes 1007–16, and discussion of supervisory liability.

118. *Iqbal*, 556 U.S. at 684.

119. *Id.* at 678.

120. *Id.* at 678–79.

121. *Id.* at 679.

122. *Id.* at 676.

123. *Id.* at 676–77. On the issue of supervisory liability, see *infra* Chapter 12.

124. *Id.* at 684–85.

125. *Id.* at 685.

126. *Id.* at 686–87. “The costs of diversion are only magnified when Government officials are charged with responding to . . . a national and international security emergency unprecedented in the history of the American Republic.” (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring), *id.* But see *id.* at 700 (Breyer, J., dissenting) (Trial court “can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. A district court, for example, can begin discovery with lower level Government defendants before determining whether a case can be made to allow discovery related to higher level Government officials.”) (citations omitted). Qualified immunity is analyzed *infra* Chapter 16.

127. The Court said that it was “important to note” that it was not expressing any view on the sufficiency of the complaint against the subordinate officers. *Iqbal*, 556 U.S. at 684. It remanded the case to the Second Circuit to decide whether to remand to the district court to allow plaintiff to “seek leave to amend his deficient complaint.” *Id.* at 687.

128. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

129. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (Stating that because case was decided below on motion to dismiss for failure to state a claim, pertinent question is “not whether [plaintiff] will ultimately prevail” on due process claim [*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)], “but whether his complaint was sufficient to cross the federal court’s threshold.” [citing *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002)]; “Skinner’s complaint is not a model of the careful drafter’s art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff’s claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible ‘short and plain’ statement of the plaintiff’s claim, not an exposition of his legal argument.”).

130. See Claire Prestel, *Pleading: Where Things Stand*, 79 U.S.L.W. 1871 (Jan. 11, 2011).

131. *Iqbal*, 556 U.S. at 679.

132. *Id.* at 696–97 (Souter, J., dissenting). Justice Souter’s dissent states that the only exception to the principle “that a court must take the [complaint] allegations as true, no matter how skeptical the court may be,” is for “allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.” *Id.* at 696.

133. 550 U.S. 544 (2007).

134. 556 U.S. 662 (2009).

135. 507 U.S. 163 (1993).

136. See *AE v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012).

137. 507 U.S. 163 (1993).

138. 556 U.S. 662 (2009).

139. See *Randall v. Scott*, 610 F.3d 701, 705–10 (11th Cir. 2010) (claims subject to qualified immunity governed by *Iqbal* plausibility standard; prior Eleventh Circuit decisions imposing heightened pleading standard for these claims are no longer good law in light of *Iqbal*).

140. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 597–98 (1998); *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995) (en banc); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005). See *infra* Chapter 12.

141. *Dennis v. Sparks*, 449 U.S. 24, 27–29 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). See *infra* Chapter 7.

142. See *infra* Chapter 22.

143. See, e.g., Fed. R. Evid. 801(d)(2)(E) (coconspirator hearsay exemption).

144. See, e.g., *Freger v. Cox*, 524 F.3d 770, 776 (6th Cir. 2008) (vague and conclusory allegations not sufficient to plead § 1983 conspiracy; § 1983 conspiracy pleading standards are “relatively strict,” requiring some degree of specificity); *Reasonover v. St. Louis Cnty.*, 447 F.3d 569, 582 (8th Cir. 2006) (§ 1983 conspiracy claims require plaintiff to “allege with particularity and specifically demonstrate material facts that the defendants reached an agreement”) (quoting *Marti v. City of Maplewood*, 57 F.3d 680, 685 (8th Cir. 1995)); *Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) (“complaints containing only conclusory, vague, or general allegations that defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct”); *Burns v. Cnty. of King*, 883 F.2d 819, 821 (9th Cir. 1989). But see *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (notice pleading governs § 1983 conspiracy claims).

145. *Twombly*, 550 U.S. at 556 (complaint must allege “plausible grounds to infer an agreement”; “a bare assertion of conspiracy will not suffice”).

146. See *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 935 (9th Cir. 2012) (en banc); *Geinosky v. City of Chi.*, 675 F.3d 743, 749 (7th Cir. 2012); *Cooney v. Rossiter*, 583 F.3d 967, 970–71 (7th Cir. 2009).

147. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1970). Accord *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). District courts should read the pleadings of a pro se plaintiff “liberally” and “interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). Accord *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999). However, pro se status does not exempt a party from compliance with procedural rules. *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

148. 551 U.S. 89 (2007).

149. *Id.* at 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

150. *Williams v. Curtis*, 631 F.3d 380, 383 (6th Cir. 2011) (citations omitted).

151. See *Gee v. Pacheco*, 627 F.3d 1178, 1185–86 (10th Cir. 2010) (ruling that context is important; including that prisoners “ordinarily know what has happened to them” and “will have learned how the institution has defended the challenged conduct when they pursue the administrative claims that they must bring as a prerequisite to filing suit”; although “a pro se prisoner may fail to plead his allegations with the skill necessary to state a plausible claim even when the facts would support one[,] ordinarily the dismissal of a pro se claim under Rule 12(b)(6) should be without prejudice”) (citations omitted); *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (ruling that while *Twombly-Iqbal* imposed “higher” plausibility standard, they did not alter court’s obligation to construe pro se complaints “liberally when evaluating them under *Iqbal*”) (citing *McGowan v. Hulick*, 612 F.3d 636, 640–42 (7th Cir. 2010); *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 461–62 (5th Cir. 2010); *Casanova v.*

Ulibarri, 595 F.3d 1120, 1124 n.2, 1125 (10th Cir. 2010); *Capogrosso v. Sup. Ct. of N.J.*, 588 F.3d 180, 184 & n.1 (3d Cir. 2009); *Harris v. Mills*, 572 F.3d 66, 71–72 (2d Cir. 2009)).

152. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615–20 (1979).

153. *See infra* Chapter 14.

154. *See infra* Chapter 21.

155. 263 U.S. 413 (1923).

156. 460 U.S. 462 (1983). When a federal court § 1983 action relates to a pending or completed state court proceeding, preclusion (*see infra* Chapter 18) and *Younger* abstention (*see infra* Chapter 21) may also be pertinent defenses to § 1983 claims.

157. 544 U.S. 280 (2005).

158. *Id.* at 291.

159. *See* 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.07 (4th ed. 2014).

160. *Exxon*, 544 U.S. at 292–94. *Accord Skinner v. Switzer*, 131 S. Ct. 1289, 1297 (2011); *Lance v. Dennis*, 546 U.S. 459, 464 (2006).

161. *Exxon Mobil*, 544 U.S. at 281. *Accord Lance*, 546 U.S. at 646. *See* *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010) (*Rooker-Feldman* doctrine applies when (1) federal plaintiff lost in state court; (2) plaintiff alleges injury caused by state court judgment; (3) state court judgment was rendered before the federal suit was filed; and (4) federal plaintiff invites district court to review and reject state court judgment); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005) (for *Rooker-Feldman* doctrine to apply: (1) plaintiff must have lost in state court; (2) the state court judgment must have been rendered before the district court proceeding commenced; (3) plaintiff must complain of injuries caused by the state court judgment; and (4) plaintiff must invite district court review and rejection of the state court judgment); *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (“*Rooker-Feldman* thus applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief from the state court judgment.”).

162. *Exxon Mobil*, 544 U.S. at 292 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

163. *Id.* at 287. *See also Skinner*, 131 S. Ct. at 1297 (observing Court has invoked *Rooker-Feldman* doctrine only twice, “in the two cases from which the doctrine takes its name,” i.e., in *Rooker* and *Feldman*).

164. *See Skinner*, 131 S. Ct. at 1297; *Lance*, 546 U.S. at 464 (noting Court in *Exxon Mobil* found that *Rooker-Feldman* “is a narrow doctrine”).

165. *See also Skinner*, 131 S. Ct. at 1298 n.10 & n.11. *See, e.g., Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 663–64 (1st Cir. 2010) (although federal suit was not barred by *Rooker-Feldman* doctrine, it was dismissed under *Younger* abstention); *Knutson v. City of Fargo*, 600 F.3d 992, 995–96 (8th Cir.) (plaintiffs’ § 1983 claims not barred by *Rooker-Feldman* doctrine but were barred by preclusion), *cert. denied*, 131 S. Ct. 357 (2010).

166. *Morrison v. City of N.Y.*, 591 F.3d 109, 115 (2d Cir. 2010).

167. *Brown v. Bowman*, 668 F.3d 437, 442–44 (7th Cir. 2012).



168. *Kougasian*, 359 F.3d at 1140 (“If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject-matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction . . . *Rooker-Feldman* thus applies only when the federal plaintiff both asserts as [an] injury legal error or errors by the state court *and* seeks as [a] remedy relief from the state court judgment.” (citations omitted)). *Accord* Guttman v. Khalsa, 446 F.3d 1027, 1031–32 (10th Cir. 2006); Kenmen Eng’g v. City of Union, 314 F.3d 468, 476 (10th Cir. 2002); Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996).

169. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 167 (3d Cir. 2010) (finding action not barred by *Rooker-Feldman* doctrine because plaintiff alleged state court losses were result of “corrupt conspiracy” between defending attorneys and certain state court judges to exchange favorable rulings and future employment as arbitrators; federal plaintiff did not allege merely that state court decisions were erroneous or unconstitutional, but that plaintiff was denied independent right to impartial forum: “The alleged agreement to reach a predetermined outcome in a case would itself violate Great Western’s constitutional rights, independently of the subsequent state court decisions.” *Id.* at 172). *See also* Kovacic v. Cuyahoga Cnty. Dep’t of Children & Family Servs., 606 F.3d 301, 310 (6th Cir. 2010) (plaintiffs’ federal court claims not barred by *Rooker-Feldman* doctrine because they did not seek review or reversal of state court decisions, and focused on conduct of public officials leading up to that decision, *cert. denied*, 131 S. Ct. 804 (2010); *Johnson v. Orr*, 551 F.3d 564, 567–70 (7th Cir. 2008) (*Rooker-Feldman* doctrine barred plaintiff’s § 1983 action because plaintiff did not suffer any injury independent of state court order and federal suit sought to overturn that order); *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 606 (6th Cir. 2007) (*Rooker-Feldman* doctrine inapplicable because plaintiff did not assert state court judgment violated his constitutional rights, and focused on conduct leading up to state judgment, namely, public defender’s failure to seek indigency hearing on behalf of indigent criminal defendant facing incarceration for unpaid fines. “Assertions of injury that do not implicate state-court judgments are beyond the purview of the *Rooker-Feldman* doctrine.”), *cert. denied*, 555 U.S. 813 (2008).

170. 131 S. Ct. 1289 (2011).

171. *See infra* Chapter 16 (*Heck* doctrine).

172. *Skinner*, 131 S. Ct. at 1298 (citations omitted).

173. *Exxon Mobil*, 544 U.S. at 286 n.1 (citing D.C. Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983)). *See also* *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007) (*Rooker-Feldman* doctrine applies even when federal court plaintiff didn’t have reasonable opportunity to litigate claim in state court because in those circumstances plaintiff should appeal through state court system and seek review in U.S. Supreme Court).

174. *See* *Campbell v. City of Spencer*, 682 F.3d 1278, 1282–83 (10th Cir. 2012) (discussing uncertainty over meaning of “inextricably intertwined”; rather than trying to “untangle the meaning” of this phrase, court applied *Exxon Mobil*’s reformulations of *Rooker-Feldman* doctrine, which eschews “inextricably intertwined” language). The Eighth Circuit stated that a federal claim is “inextricably intertwined” with the state court judgment when “the



federal claim succeeds only to the extent that the state court wrongly decided the issues before it.” *Robins v. Ritchie*, 631 F.3d 919, 925 (8th Cir. 2011) (holding federal court § 1983 claims barred by *Rooker-Feldman* doctrine because they were “inextricably intertwined” with state law claims in state court action). *See also* *Allstate Ins. Co. v. W. Va. State Bar*, 233 F.3d 813, 819 (4th Cir. 2000). The Third Circuit stated that the phrase “inextricably intertwined” has no independent meaning and simply describes federal court claims that meet the *Rooker-Feldman* doctrine elements outlined in *Exxon-Mobil. Great W. Mining*, 615 F.3d at 170. *See also* *Bolden v. City of Topeka*, 441 F.3d 1129, 1140 (10th Cir. 2006).

175. *Exxon Mobil*, 544 U.S. at 291; *Guttman*, 446 F.3d at 1032; *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F.3d 17, 26 (1st Cir. 2005) (for *Rooker-Feldman* doctrine to apply, state proceedings must have “ended with respect to the issues that the federal plaintiff seeks to have reviewed in federal court, even if other matters remain to be investigated”).

176. *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 663–64 (1st Cir. 2010) (holding district court erred in relying upon *Rooker-Feldman* doctrine, because when federal suit was filed, state case was pending before state appeals court; “It is a condition precedent to the application of the *Rooker-Feldman* doctrine that, at the time the federal-court suit is commenced, the state-court proceedings have ended.”; fact that state court proceedings were completed during the federal litigation is irrelevant; although case was not barred by *Rooker-Feldman*, it was barred by *Younger* abstention) (citations omitted) (emphasis added); *Nicholson v. Shafe*, 558 F.3d 1266, 1279 (11th Cir. 2009); *Guttman v. Khalsa*, 446 F.3d 1027, 1031–32 (10th Cir. 2006).

177. *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994); *Holiday Amusement Co. of Charleston, Inc. v. South Carolina*, 40 F.3d 534, 537 (4th Cir. 2005); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 297 (6th Cir. 2005).

178. 546 U.S. 459 (2006).

179. The Court in *Lance* hedged its ruling ever so slightly, stating that it need not decide “whether there are *any* circumstances, however limited, in which *Rooker-Feldman* may be applied against a party not named in an earlier state proceeding—e.g., where an estate takes a *de facto* appeal in a district court of an earlier state court decision involving the decedent.” *Id.* at 466 n.2.

180. *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 644 n.3 (2002).

181. 383 U.S. 715 (1966).

182. 28 U.S.C. § 1367(a) (1990).

183. *Gibbs*, 383 U.S. at 725.

184. *See Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639–40 (2009) (district court’s decision whether to exercise supplemental jurisdiction after dismissing all jurisdiction-conferring claims “is purely discretionary,” and thus reviewable on appeal for abuse of discretion).

185. 28 U.S.C. § 1367(c) (1990).

186. *See Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 465–67 (2003) (supplemental jurisdiction may be asserted in § 1983 actions against municipalities).

187. *See Exxon Mobil Corp. v. Allapattah*, 545 U.S. 546, 558–59 (2005) (recognizing that § 1367 overturned *Finley v. United States*, 490 U.S. 545 (1989), which had rejected pendent

party jurisdiction in actions under Federal Tort Claims Act; stating “The last sentence of § 1367 makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties . . . . [Section] 1367(a) is a broad jurisdictional grant with no distinctions drawn between pendent-claim and pendent-party cases. . . . The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction.”).

188. 28 U.S.C. § 2633.

189. 522 U.S. 156 (1997).

190. Federal courts in New York, however, have been very reluctant to exercise supplemental jurisdiction over state judicial review claims. *See Morningside Supermarket Co. v. N.Y. State Dep’t of Health*, 432 F. Supp. 2d 334, 346–47 (S.D.N.Y. 2006) (citing cases). *See also Coastal Comm. Serv., Inc. v. City of N.Y.*, 658 F. Supp. 2d 425 (E.D.N.Y. 2009).

191. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 536 (2002). *Cf. Jinks*, 538 U.S. at 466–67 (supplemental jurisdiction may be asserted in § 1983 action against municipality).

192. *See Jinks*, 538 U.S. at 461, 464–67 (§ 1367(d) tolling provision is within Congress’s legislative power, does not impermissibly intrude on states’ rights, and encompasses claims against municipal entities).

193. *Raygor*, 534 U.S. at 544.

194. *Jinks*, 538 U.S. at 465–67.

195. 28 U.S.C. § 1441(a)–(b) (1988).

196. *City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 172–73 (1997).

197. *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389–90 (1998).

198. *Lapides v. Bd. of Regents*, 535 U.S. 613, 619–20 (2002). *See infra* Chapter 13.

199. *Haywood v. Drown*, 556 U.S. 729, 734–35 (2009); *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 588–89 (1995); *Howlett v. Rose*, 496 U.S. 356, 375 (1990); *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 234 (1987); *Patsy v. Bd. of Regents*, 457 U.S. 496, 506–07 (1982). *See* Steven H. Steinglass, *Section 1983 Litigation in State Courts* (2006).

200. Steinglass, *supra* note 199, § 10.1, p. 10-1 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

201. *Felder v. Casey*, 487 U.S. 131, 138, 145 (1988).

202. *Id.* at 138 (state notice-of-claim rule not applicable to § 1983 claims). *See also Haywood*, 556 U.S. at 736–42 (New York statute barring assertion of § 1983 personal-capacity claims against correction officers in New York courts held invalid under Supremacy Clause because state policy conflicts with policies underlying § 1983). *See generally* *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298–99 (1949) (local practice rules may not unduly burden the federal right). *See infra* Chapter 17.

203. *Howlett*, 496 U.S. at 375–76.

204. 496 U.S. 356 (1990).

205. *See Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 586 (1995) (policies of Tax Injunction Act apply in state court § 1983 actions challenging state tax policies); *Howlett*, 496 U.S. at 383 (state law immunity defense doesn’t apply to § 1983 municipal liability claim); *Felder*, 487 U.S. at 138 (state notice-of-claim rules don’t apply in state or federal court § 1983 actions); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989)

(whether plaintiffs file § 1983 claim in state or federal court, states and state entities not suable “persons” under § 1983). *See also Haywood*, 556 U.S. 729 (state law may not prohibit § 1983 personal-capacity claims against corrections officers in state court). State courts, however, aren’t obligated to grant § 1983 defendants an interlocutory appeal from the denial of qualified immunity, even when federal law would permit an interlocutory appeal in federal court. *Johnson v. Finkel*, 520 U.S. 911, 913 (1997). *See infra* Chapter 16.

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206. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (legal aliens); *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal aliens). *See also* 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 2.02 (4th ed. 2014).

207. *See* discussion in 1 Schwartz, *supra* note 206, § 2.02. Although labor unions have been permitted to sue under § 1983, the Tenth Circuit held that an unincorporated association may not sue under § 1983. *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006).

We conclude . . . that the Dictionary Act of 1871, the common understanding regarding unincorporated associations in 1871, and the legislative history of Section 1 of the Civil Rights Act of 1871 fail to indicate a congressional intent to include unincorporated associations within the ambit of the term “person” set forth in 42 U.S.C. § 1983.

*Id.* at 1216.

208. *Inyo Cnty., Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66 (1989)).

209. *Id.* *See also* *Muscogee (Creek) Nation v. Okla. Tax Comm’n*, 611 F.3d 1222, 1234–36 (10th Cir. 2010) (Indian Tribe’s challenge to Oklahoma cigarette tax enforcement scheme not cognizable under § 1983: tribe sought to vindicate its sovereign immunity and thus was not “person” entitled to sue under § 1983; “. . . a ‘person’ within the meaning of § 1983 possesses neither ‘sovereign rights’ nor ‘sovereign immunity.’”); *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 596 (6th Cir. 2009) (claim by Indian tribe (the “Community”), arising out of Michigan’s withholding of federal funds owed to Community, which state offset from back taxes it said Community owed, and seeking to prohibit defendants, state officials, from imposing sales and use taxes on tribe’s property and services; Sixth Circuit remanded case to district court “to determine whether the Community was entitled to the federal funds (a) only as a result of its sovereignty, or (b) simply because it provides certain social services. If it is the latter, then Community’s § 1983 suit would not be in any way dependent on its status as a sovereign, and it should be considered a ‘person’ within the meaning of that statute, so long as other private, nonsovereign entities could likewise sue under § 1983.”); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514–15 (9th Cir. 2005) (en banc) (holding tribe can’t assert treaty-based rights against United States under § 1983 because it’s not a “person” entitled to sue under § 1983 for violation of sovereign prerogative; nor were tribe members entitled to sue because asserted fishing treaty rights were communal, even though individual members benefit from them).

210. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004).

211. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Seldin*, 422 U.S. 490, 498–500 (1975). *Accord* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Daimler Chrysler Corp.*

v. Cuno, 547 U.S. 332, 342 (2006). The Supreme Court has taken a narrow view of taxpayer standing. *Ariz. Christian Sch.*, 131 S. Ct. at 1442–49 (state taxpayers have standing only when they challenge state spending under Establishment Clause and not, as in instant case, when they challenge tax credit policy).

212. See Erwin Chemerinsky, *Federal Jurisdiction*, § 2.3.4 (5th ed. 2007). Exceptions to the rule against third-party standing allow a party to assert the rights of a third party when the rights of the litigant before the court and the rights of the third party are closely related (e.g., physician and patient) or where an obstacle prevents the third party from asserting her own claim. *Singleton v. Wulff*, 428 U.S. 106, 113–16 (1976).

213. 461 U.S. 95 (1983).

214. *Id.* at 98.

215. *Id.* at 113.

216. *Id.* at 101–02.

217. *Id.* at 105.

218. *Id.*

219. *Id.* at 98.

220. *Id.* at 111. The Court relied on its prior decisions in *O’Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976).

221. *Lyons*, 461 U.S. at 111.

222. *Id.* at 105, 106.

223. *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 WL 2675871 (S. Ct. June 16, 2014).

## Chapter 5: Constitutional Rights Enforceable Under § 1983, p. 29

224. See *infra* Chapter 7.

225. *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010). See also *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment guarantees individual right to possess gun for personal safety, not just for military service). Since *McDonald* and *Heller* there has been an increase in § 1983 actions challenging state and local gun control legislation. See, e.g., *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012).

226. 498 U.S. 439 (1991).

227. *Id.* at 446–47.

228. 493 U.S. 103 (1989).

229. *Id.* at 107.

230. See *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006) (Sotomayor, J.) (“A claim under the Supremacy Clause that federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.”) (quoting *W. Airlines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 (2d Cir. 1987)). See also *infra* Chapter 6.

231. 468 U.S. 992 (1984).

232. The EHA was subsequently renamed the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004).

233. 555 U.S. 246 (2009).

234. *Id.* at 256 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

235. *Id.* at 252 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)).

236. *Id.* at 252–53.

237. *Id.* at 254 (citing *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 6 (1981); *Smith*, 468 U.S. at 1011–12; *Rancho Palos Verdes*, 544 U.S. at 122)). Of these three decisions, only *Smith* raised the issue of whether the particular federal statutory scheme precluded constitutional (as opposed to federal statutory) claims under § 1983.

238. *Fitzgerald*, 555 U.S. at 256 (quoting *Rancho Palos Verdes*, 544 U.S. at 121 and *Smith*, 468 U.S. at 1012) (citations omitted).

239. Whereas Title IX only reaches federally funded schools, § 1983 is not so limited. Title IX covers private schools, which are generally not suable under § 1983, which reaches only state action. Title IX does not authorize suit against individual officials, while § 1983 allows claims against individual officials and municipal entities. Title IX has several exemptions not applicable in § 1983 actions. “For example, Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions; it exempts military service schools and traditionally single-sex public colleges from all of its provisions. Some exempted activities may form the basis of equal protection claims.” *Fitzgerald*, 555 U.S. at 257 (citations omitted). The standards of

liability may not be wholly congruent. . . . [A] Title IX plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1998). A plaintiff stating a similar claim via § 1983 for violation of the Equal Protection Clause by a school district or other municipal entity must show that the harassment was the result of municipal custom, policy, or practice. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978).

*Id.* at 257–58.

240. *Id.* at 258. The Court found that “[t]his conclusion is consistent with Title IX’s context and history.” *Id.* Title IX authorizes the Attorney General to intervene in private suits alleging gender discrimination under the Equal Protection Clause. This authorization implicitly acknowledges the availability of the § 1983 constitutional remedy. Moreover, Congress modeled Title IX after Title VI, which was routinely interpreted by the courts of appeals “to allow for parallel and concurrent § 1983 claims” (citations omitted). *Id.*

*Fitzgerald* did not decide whether the plaintiffs alleged an actionable § 1983 equal protection claim against the school superintendent and the school committee.

ADEA: Prior to the Supreme Court’s decision in *Fitzgerald*, most lower federal courts held that the comprehensive remedial scheme of the Age Discrimination in Employment Act substantiates that Congress intended to preclude § 1983 Equal Protection Clause age-discrimination claims. *Migneault v. Peck*, 204 F.3d 1003 (10th Cir. 2000); *Lafleur v. Tex. Dep’t of Health*, 126 F.3d 758 (5th Cir. 1997); *Zombro v. Balt. Police Dep’t*, 868 F.3d 1364 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989). *See also* *Ahlmeier v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009) (decided shortly after *Fitzgerald* but not citing it). However, post-*Fitzgerald*, the Seventh Circuit reached the opposite result, holding that the ADEA does not preclude assertion of § 1983 age-discrimination-in-employment constitutional claims. *Levin v. Madigan*, 692 F.3d 607, 611–22 (7th Cir. 2012), *cert. dismissed*, 134 S. Ct. 2 (2013). *Levin* acknowledged that the ADEA itself is not enforceable under § 1983. *Id.* at 620.

241. 490 U.S. 386 (1989).

242. *Graham* held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.” *Graham*, 490 U.S. at 395. *See also* *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (deadly force); *Graham*, 490 U.S. at 396–97. Fourth Amendment excessive force claims are subject to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 203 (2001) (*see infra* Chapter 16).

243. *Graham*, 490 U.S. at 393.

244. *Id.* at 394. Excessive force claims asserted by convicted prisoners are governed by the Eighth Amendment prohibition against cruel and unusual punishment. To establish an Eighth Amendment violation, the plaintiff must show that the force was applied “maliciously and sadistically to cause harm” rather than “in a good-faith effort to maintain or restore discipline.” *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). Excessive force claims asserted by pretrial detainees are governed by the due process prohibition against the infliction of “punishment” on pretrial detainees. *See generally* *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), discussed *infra* Chapter 5, § V.C.

245. *See infra* Chapter 5, § VI.

246. *See* 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 3.12 (4th ed. 2014).

247. *See id.*

248. *Thore v. Howe*, 466 F.3d 173, 179 (1st Cir. 2006) (complaint must allege conspiracy to violate constitutional right); *Cefau v. Vill. of Elk Grove*, 211 F.3d 416, 423 (7th Cir. 2000); *Young v. Cnty. of Fulton*, 160 F.3d 899, 904 (2d Cir. 1998).

249. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Voyticky v. Vill. of Timberlake*, 412 F.3d 669, 678 (6th Cir. 2005) (intentional infliction of emotional distress does not itself give rise to § 1983 constitutional claim). Violations of state constitutional rights are not enforceable under § 1983. *See, e.g., Armstrong v. Asselin*, 734 F.3d 984, 989 (9th Cir. 2013); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 314 (6th Cir. 2005) (“[A] claimed violation of a state constitutional right is not cognizable under § 1983.”); *Bookman v. Shubzda*, 945 F. Supp. 999, 1009 (N.D. Tex. 1996).

250. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 129–30 (1992) (safe working conditions); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201–02 (1989) (protection of children from parental abuse); *Paul v. Davis*, 424 U.S. 693, 711–12 (1976) (defamation). The Supreme Court recognized substantive due process protection in high-speed police pursuit cases, but imposed a demanding burden on plaintiffs. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853–54 (1998) (passengers killed or injured as result of high-speed police pursuit may assert substantive due process claim under “shocks-the-conscience standard” and must show pursuing officer acted with intent to cause harm).

251. *Estelle*, 429 U.S. at 106.

252. The Court in *Estelle* held that to establish a violation of the Eighth Amendment a prisoner must prove that prison officials were deliberately indifferent to the prisoner’s “serious medical needs.” *Estelle*, 429 U.S. at 106.

253. 443 U.S. 137 (1979).

254. *Id.* at 146.
255. 424 U.S. 693 (1976).
256. *Id.* at 711–12. The plaintiff in *Paul* asserted a *procedural* due process claim. *See infra* notes 295–97 and accompanying text.
257. *Id.* at 701.
258. 503 U.S. 115 (1992).
259. *Id.* at 128–30.
260. *Id.* at 128 (citing *Daniels v. Williams*, 474 U.S. 327, 332–33 (1986); *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693, 701 (1976)).
261. 408 U.S. 564 (1972).
262. *Id.* at 577.
263. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds by* *Daniels v. Williams*, 474 U.S. 327 (1986). *See also* *Zinermon v. Burch*, 494 U.S. 113, 129–38 (1990) (demonstrating difficulty of determining whether conduct was “random and unauthorized”; majority held conduct not random and unauthorized, but four justices dissented).
264. *Zinermon*, 494 U.S. at 125 (quoting *Daniels*, 474 U.S. at 331).
265. *Id.*
266. *Id.*
267. *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). *See also* *Swarthout v. Cooke*, 131 S. Ct. 859, 860–62 (2011).
268. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). *See, e.g.,* *Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that “the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law”).
269. *See, e.g.,* *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (Due Process Clause confers on prisoners liberty interest in being free from involuntary administration of psychotropic drugs); *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (Due Process Clause confers on prisoners liberty interest in not being involuntarily committed to state mental hospital).
270. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state law created liberty interest in “shortened prison sentence” that resulted from good time credits). *See also* *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011); *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).
271. *Cleveland Bd. of Educ.*, 470 U.S. at 538 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).
272. 408 U.S. 564 (1972).
273. *Id.* at 577.
274. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).
275. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
276. *Bell v. Burson*, 402 U.S. 535, 539 (1971).
277. *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975).
278. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978).
279. *See, e.g.,* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985).
280. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).
281. *Id.* at 760–62.



282. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (state's breach of contract did not give rise to procedural due process claim because state law provided "ordinary breach-of-contract suit"); *Ramirez v. Arlequin*, 447 F.3d 19, 25 (1st Cir. 2006) (without allegation state would refuse to remedy breach, claim that state actor breached contract does not state procedural due process claim); *Redondo-Borges v. United States Dep't of Hous. & Urban Dev.*, 421 F.3d 1, 10 (1st Cir. 2005) ("the existence of a state contract, simpliciter, does not confer upon the contracting parties a constitutionally protected property interest"); *Dover Elevator Co. v. Ark. State Univ.*, 64 F.3d 442, 446 (8th Cir. 1995) ("It is well established that 'a simple breach of contract does not give rise to the level of a constitutional deprivation.'" (quoting *Med. Laundry Servs. v. Bd. of Trs. of Univ. of Ala.*, 906 F.2d 571, 573 (11th Cir. 1990))).

283. 515 U.S. 472 (1995).

284. *Id.* at 484. Although under *Sandin*, mandatory language of a state prison regulation remains a necessary, though not sufficient, prerequisite for finding a liberty interest, post-*Sandin* the courts have routinely proceeded directly to the question of whether the sanction imposed "atypical and significant hardship" on the inmate. *See* decisions in 1 Schwartz, *supra* note 246, § 3.05[c][4][b]. Before *Sandin*, the Supreme Court held that convicted prisoners only have a liberty interest in parole release if a state statute or regulation creates a reasonable expectation, rather than a mere possibility, of being granted parole. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 11–12 (1979). *See also* *Swarthout v. Cooke*, 131 S. Ct. 859, 861–62 (2011).

285. *See, e.g., Hernandez v. Velasquez*, 522 F.3d 556, 562–64 (5th Cir. 2008) (placement of prisoner serving life sentence for murder on lockdown status for thirteen months to prevent gang-related violence not "atypical and significant hardship" but "ordinary incident of prison life."); *Townsend v. Fuchs*, 522 F.3d 765, 771 (7th Cir. 2008) (discretionary placement of inmate in nonpunitive temporary lock-up segregation while officials investigated his possible role in prison riot not deprivation of liberty); *Hanrahan v. Doling*, 331 F.3d 93, 97–99 (2d Cir. 2003) (120 months solitary confinement is deprivation of liberty); *Bass v. Perrin*, 170 F.3d 1312, 1318 (11th Cir. 1999) (deprivation of "yard time" to inmate in solitary confinement is "atypical and significant hardship"); *Jones v. Baker*, 155 F.3d 810, 814–16 (6th Cir. 1998) (over two-and-one-half years administrative segregation for prisoner implicated in killing of prison guard during prison riot not "atypical and significant hardship"); *Griffin v. Vaughn*, 112 F.3d 703, 708 (3d Cir. 1997) ("Exposure to the conditions of administrative custody for periods as long as 15 months 'falls within the expected parameters of the sentence imposed [on him] by a court of law.'"); *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) ("After *Sandin*, in order to determine whether a prisoner has a liberty interest in avoiding disciplinary confinement, a court must examine the specific circumstances of the punishment."); *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997) ("*Sandin* did not create a *per se* blanket rule that disciplinary confinement may never implicate a liberty interest. Courts of appeals in other circuits have apparently come to the same conclusion, recognizing that district courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest."); *Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996) (finding no liberty interest in work release status); *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995) (holding no liberty interest in job assignment);



Orellana v. Kyle, 65 F.3d 29, 31–32 (5th Cir. 1995) (suggesting that only deprivations “that clearly impinge on the duration of confinement, will henceforth qualify for constitutional ‘liberty’ status”), *cert. denied*, 516 U.S. 1059 (1996); Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (observing “*Sandin* implies that states may grant prisoners liberty interests in being in the general population only if the conditions of confinement in segregation are significantly more restrictive than those in the general population”).

286. Teller v. Fields, 280 F.3d 69, 80 (2d Cir. 2000). *See also* Davis v. Barrett, 576 F.3d 129, 134–35 (2d Cir. 2009); Marion v. Columbia Corr. Inst., 559 F.3d 693, 699 (7th Cir. 2009).

287. Sealey v. Giltner, 197 F.3d 578, 585 (2d Cir. 1999).

288. 418 U.S. 539 (1974).

289. *Id.* at 557. *See* Madison v. Parker, 104 F.3d 765, 769 (5th Cir. 1997). Before being deprived of good-time credits, an inmate must be afforded (1) twenty-four-hour advance written notice of the alleged violations; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when such presentation is consistent with institutional safety); and (4) a written decision by the fact finder stating the evidence relied on and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563–71.

290. *See, e.g.,* Whitford v. Boglino, 63 F.3d 527, 532 n.5 (7th Cir. 1995). Note, however, that “the mere opportunity to earn good-time credits” has been held not to “constitute a constitutionally cognizable liberty interest sufficient to trigger the protection of the Due Process Clause.” Luken v. Scott, 71 F.3d 192, 193–94 (5th Cir. 1995) (*per curiam*). The Supreme Court held that Oklahoma’s Parole Conditional Supervision Program, “a program employed by the State of Oklahoma to reduce the overcrowding of its prisons[,] was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey v. Brewer*, 408 U.S. 471 . . . (1972), before he could be removed from it.” Young v. Harper, 520 U.S. 143, 144–45 (1997).

291. *See, e.g.,* Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997); Cornell v. Woods, 69 F.3d 1383, 1388 n.4 (8th Cir. 1995); Pratt v. Rowland, 65 F.3d 802, 806–07 (9th Cir. 1995).

292. 545 U.S. 209 (2005).

293. *Id.* at 223.

294. *Id.*

295. 424 U.S. 693 (1976).

296. The Court in *Davis*, 424 U.S. at 709, cited *Board of Regents v. Roth*, 408 U.S. 564 (1972), to illustrate this point. *See* Patterson v. City of Utica, 370 F.3d 322, 330 (2d Cir. 2004) (internal quotation marks, citations, and footnotes omitted):

In order to fulfill the requirements of a stigma-plus claim arising from the termination from government employment, a plaintiff must first show that the government made stigmatizing statements about him—statements that call into question plaintiff’s good name, reputation, honor, or integrity. Statements that denigrate the employee’s competence as a professional and impugn the employee’s professional reputation in such a fashion as to effectively put a significant roadblock in that employee’s continued ability to practice his or her profession may also fulfill this requirement. A plaintiff generally is required only to raise the falsity of these stigmatizing statements as an issue, not prove they are false.

*See also* Segal v. City of N.Y., 459 F.3d 207, 212–13 (2d Cir. 2006).

297. See 1 Schwartz, *supra* note 246, § 3.05[c].

298. *Zinerman v. Burch*, 494 U.S. 113, 126 (1990).

299. *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

300. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See *Jones v. Flowers*, 547 U.S. 164 (2006); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Menonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Greene v. Lindsey*, 456 U.S. 444 (1982); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

301. 424 U.S. 319 (1976).

302. *Id.* at 335. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 228 (2005) (applying *Eldridge* balancing formula, finding Ohio's procedures for placement of prisoners in supermax facility satisfied procedural due process because inmate was guaranteed multiple levels of review, notice of factual basis for placement, and fair opportunity for rebuttal; given strong security interest in prison security, fact Ohio did not allow inmate to call witnesses "or provide other attributes of an adversary hearing" did not violate procedural due process because to do so might jeopardize control of prisoner and prison); *Washington v. Harper*, 494 U.S. 210, 229–33 (1990) (mentally ill state prisoner challenged prison's administering antipsychotic drugs to him against his will without judicial hearing to determine appropriateness of such treatment, and prison policy required treatment decision to be made by hearing committee consisting of psychiatrist, psychologist, and prison facility's associate superintendent; Court applied *Eldridge* balancing test and found established procedure constitutionally sufficient).

303. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

304. *Gilbert v. Homar*, 520 U.S. 924 (1997).

305. *Loudermill*, 470 U.S. at 545.

306. *Gilbert*, 520 U.S. at 932.

307. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435–36 (1982).

308. *Zinerman v. Burch*, 494 U.S. 113, 136 (1990). A strong state interest in acting quickly may justify dispensing with predeprivation process, in which case a post-deprivation opportunity to be heard will satisfy procedural due process. See *Gilbert*, 520 U.S. at 930; *Barry v. Barchi*, 443 U.S. 55, 64–65 (1979).

309. *Hudson v. Palmer*, 468 U.S. 517, 531–33 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543 (1981), *overruled in part*, *Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, the Court overruled *Parratt* to the extent that *Parratt* had held that a deprivation within the meaning of the Fourteenth Amendment Due Process Clause could be effected by mere negligent conduct. *Daniels*, 474 U.S. at 330–31.

310. Compare, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 536–37 (1st Cir. 1995) (concluding that officials' failure to adhere to sex-education policy was "random and unauthorized" within meaning of *Parratt-Hudson* doctrine), *cert. denied*, 516 U.S. 1159 (1996), with *Alexander v. Ieyoub*, 62 F.3d 709, 712 (5th Cir. 1995) (finding defendants' conduct—delaying forfeiture proceeding for nearly three years—was authorized under state law where defendants had discretion to institute proceedings whenever they wanted).

311. *Zinerman*, 494 U.S. at 128.

312. *Parratt*, 451 U.S. at 541.

313. See *Rivera-Powell v. N.Y. City Board of Elections*, 470 F.3d 458, 465 (2d Cir. 2006) (“distinction between random and unauthorized conduct and established state procedures . . . is not clear-cut”).

314. 494 U.S. 113 (1990). *Zinerman* has been interpreted as creating a category of procedural due process claims that falls outside “two clearly delineated categories; those involving a direct challenge to an established state procedure or those challenging random and unauthorized acts.” *Mertik v. Blalock*, 983 F.2d 1353, 1365 (6th Cir. 1993).

315. *Zinerman*, 494 U.S. at 136.

316. *Id.* at 136–38.

317. *San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465, 493–94 (1st Cir. 2012) (en banc), cert. denied, 133 S. Ct. 1580 (2013); *Johnson v. La. Dep’t of Agric.*, 18 F.3d 318, 322 (5th Cir. 1994); *Easter House v. Felder*, 910 F.2d 1387, 1410 (7th Cir. 1990) (en banc).

318. *Velez v. Levy*, 401 F.3d 75, 92 (2d Cir. 2005). See also *Rivera-Powell*, 470 F.3d at 465; *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003).

319. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

320. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion). See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (right of close relatives to reside together).

321. *Albright*, 510 U.S. at 272 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Accord *District Attorney’s Office v. Osborne*, 557 U.S. 52, 72 (2009).

322. See *Osborne*, 557 U.S. at 72; *Cnty. of Sacramento*, 523 U.S. at 842; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Albright*, 510 U.S. at 271; *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). But see *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (holding Due Process Clause prohibits state from imposing “grossly excessive” punishment on tortfeasor).

323. *Albright*, 510 U.S. at 273 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Accord *Cnty. of Sacramento*, 523 U.S. at 843.

324. See *Cnty. of Sacramento*, 523 U.S. at 843 (stating “[s]ubstantive due process analysis is therefore inappropriate . . . only if [the] claim is ‘covered by’ the Fourth Amendment”).

325. 523 U.S. 833 (1998).

326. *County of Sacramento* cited as an example of a substantive due process challenge to a state legislative policy, *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (rejecting substantive due process challenge to state criminalization of physician-assisted suicide). *Cnty. of Sacramento*, 523 U.S. at 840.

327. See also *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

328. *Cnty. of Sacramento*, 523 U.S. at 834 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

329. See, e.g., *Folkerts v. City of Waverly*, 707 F.3d 975, 981 (8th Cir. 2013) (police investigator’s modified interrogation technique for suspect with IQ of fifty didn’t “shock conscience”); *Martinez v. Cui*, 608 F.3d 54, 63–65 (1st Cir. 2010) (“shocks the conscience” test governs alleged sexual assault by government officer).

330. *Gonzales-Fuentes v. Molina*, 607 F.3d 864, 880–85 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

331. *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (en banc).

332. *Rivera v. Illinois*, 556 U.S. 148, 160 (2009). *Accord Mills v. City of Grand Rapids*, 614 F.3d 495, 500 (8th Cir. 2010).

333. *Hussein v. City of Perrysburg*, 617 F.3d 828, 832–33 (6th Cir. 2010) (quoting *Bell v. Ohio State Univ.*, 351 F.3d 240, 250 (6th Cir. 2003)).

334. *Jones v. Byrnes*, 585 F.3d 971, 978 (6th Cir. 2009); *ibid.* at 978–79 (concurring opinion). For examples of recent high-speed pursuit decisions rejecting substantive due process claims, *see Bingue v. Prunchak*, 512 F.3d 1169 (9th Cir. 2008); *Sitzes v. City of W. Memphis*, 606 F.3d 461 (8th Cir.), *cert. denied*, 131 S. Ct. 828 (2010); *Ellis v. Ogden City*, 589 F.3d 1099 (10th Cir. 2009); *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009); *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001), *cert. denied*, 534 F.3d 1115 (2002).

335. *See, e.g., McConkie v. Nichols*, 446 F.3d 258 (1st Cir. 2006); *Moore v. Nelson*, 394 F. Supp. 2d 1365 (M.D. Ga. 2005).

336. 557 U.S. 52 (2009).

337. *Id.* at 56.

338. *Id.* at 73. The Court in *Osborne* analogized to *Washington v. Glucksberg*, 521 U.S. 702 (1997), where the Court, in rejecting a claimed substantive due process right to physician-assisted suicide, relied partly on the fact that the states were “engaged in serious thoughtful examinations” of the issue, *id.* at 719, and that constitutionalizing the issue would “to a great extent [have placed] the matter outside the arena of public debate and legislative action.” *Id.* at 720.

339. 373 U.S. 83 (1963).

340. *Osborne*, 557 U.S. at 67–68 (citing *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)).

341. The state-created liberty interest was based upon Alaska law, which “provides that those who use ‘newly discovered evidence’ to ‘establis[h] by clear and convincing evidence that [they are] innocent’ may obtain ‘vacation of [their] conviction or sentence in the interest of justice.’ Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4).” *Osborne*, 557 U.S. at 68.

342. *Osborne*, 557 U.S. at 69.

343. *Id.*

344. *Id.* at 71 (citations omitted). Although *Osborne* asserted an “actual innocence” claim, he conceded that such a claim would have to be asserted in a federal habeas corpus proceeding. *Id.* at 71–72.

345. *See* 1 Schwartz, *supra* note 246, § 10.03.

346. *Osborne*, 557 U.S. at 72 (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)). *See also Skinner v. Switzer*, 131 S. Ct. 1289, 1293 (2011) (interpreting *Osborne* as rejecting substantive due process right of postconviction access to evidence for DNA testing, and leaving “slim room” for as-applied procedural due process claim).

347. 457 U.S. 307 (1982).

348. *Id.* at 323.

349. *See, e.g.*, *J.W. v. Utah*, 647 F.3d 1006, 1011 (10th Cir. 2011); *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 893–94 (10th Cir. 1992) (adopting professional judgment standard, rather than deliberate indifference, in foster care setting).

350. *See, e.g.*, *Doe v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 172–75 (4th Cir. 2010); *Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 880–883 (5th Cir. 2004); *Nicini v. Morra*, 212 F.3d 798, 810–12 (3d Cir. 2000) (en banc); *Lintz v. Skipski*, 25 F.3d 304, 306 (6th Cir.), *cert. denied*, 513 U.S. 988 (1994).

351. 489 U.S. 189 (1989).

352. *Id.* at 195.

353. *Id.* at 197. Joshua DeShaney, a four-year-old boy, had been repeatedly beaten by his father. The county child protection agency had monitored Joshua’s case through social workers and at one point took custody of him, but failed to protect him from his father’s last beating, which left the child permanently brain damaged. *Id.* at 192–93.

354. *Id.* at 199–200; *see, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994) (state has constitutional duty to protect prisoners from attacks by fellow prisoners) (*see infra* Ch. 5, § VIII); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding substantive due process component of Fourteenth Amendment Due Process Clause imposes duty on state to provide for safety and medical needs of involuntarily committed mental patients); *Estelle v. Gamble*, 429 U.S. 97 (1976) (state has constitutional duty to provide adequate medical care to incarcerated prisoners).

355. *See* 1 Schwartz, *supra* note 246, § 3.09.

356. *See, e.g.*, *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995) (en banc) (“[I]f the person claiming the right of state protection is *voluntarily* within the care or custody of a state agency, he has no substantive due process right to the state’s protection from harm inflicted by third party non-state actors. We thus conclude that *DeShaney* stands for the proposition that the state creates a ‘special relationship’ with a person only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state; otherwise, the state has no duty arising under the Constitution to protect its citizens against harm by private actors.”).

At least one circuit has suggested that the concept of “in custody” for triggering an affirmative duty to protect under *DeShaney* entails more than a “simple criminal arrest.” *See Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1175 (7th Cir. 1997) (“The Supreme Court’s express rationale in *DeShaney* for recognizing a constitutional duty does not match the circumstances of a simple criminal arrest. . . . This rationale on its face requires more than a person riding in the back seat of an unlocked police car for a few minutes.”).

357. *DeShaney*, 489 U.S. at 201 n.9.

358. *See, e.g.*, *Xiong v. Wagner*, 700 F.3d 282, 293 (7th Cir. 2012) (holding child has due process right to be placed by state safe and secure foster home); *J.W. v. Utah*, 647 F.3d 1006, 1011 (10th Cir. 2011) (holding failure to exercise professional judgment violated process duty); *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 842–46 (9th Cir. 2010) (deliberate indifference is governing due process standard); *Doe v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010) (same); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (holding “state has certain affirmative duties” in foster care situation). *See also* Schwartz v. Booker, 702 F.3d 573 (10th Cir. 2012); *Camp v. Gregory*, 67 F.3d 1286, 1297 (7th Cir. 1995);

*Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992). *But see* *D.W. v. Rogers*, 113 F.3d 1214, 1218 (11th Cir. 1997) (“the state’s affirmative obligation to render services to an individual depends not on whether the state has legal custody of that person, but on whether the state has physically confined or restrained the person”); *White v. Chambliss*, 112 F.3d 731, 738 (4th Cir. 1997) (“Given the state of this circuit’s law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of [child’s] death.”); *Wooten v. Campbell*, 49 F.3d 696, 699–701 (11th Cir. 1995) (finding no “substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child’s physical custody except to arrange court-ordered visitation with the non-custodial parent”).

359. *See, e.g.,* *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1001 (5th Cir. 2014); *Morrow v. Balaski*, 719 F.3d 160, 165, 179 (3d Cir. 2013) (en banc); *Doe v. Covington Sch. Dist.*, 675 F.3d 849, 856–63 (5th Cir. 2012); *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973–74 (9th Cir. 2011); *McQueen v. Beecher Cmty. Schools*, 433 F.3d 460, 464 n.4 (6th Cir. 2006); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73–74 (1st Cir. 1999); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc); *Doe v. Claiborne Cnty.*, 103 F.3d 495, 510 (6th Cir. 1996); *Nabozny v. Podlesny*, 92 F.3d 446, 458–59 (7th Cir. 1996); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir. 1994); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371–72 (3d Cir. 1992) (en banc); *J.O. v. Alton Sch. Dist.*, 909 F.2d 267, 272–73 (7th Cir. 1990). *See also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

360. Schoolchildren, however, have a liberty interest in their bodily integrity that is protected by the Due Process Clause against deprivation by the state. *See* *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977). Therefore, *DeShaney* does not apply where the alleged harm is attributed to a state actor, generally a teacher or other school official. *See, e.g.,* *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3d Cir. 1989) (distinguishing this situation from *DeShaney* because injury here—sexual molestation—resulted from conduct of state employee, not private actor), *cert. denied*, 493 U.S. 1044 (1990).

361. *See, e.g.,* *Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283, 1285 (7th Cir. 1991) (holding presence in publicly subsidized housing not functional equivalent of being “in custody”).

362. *See, e.g.,* *Wallace v. Adkins*, 115 F.3d 427, 430 (7th Cir. 1997) (“[P]rison guards ordered to stay at their posts are not in the kind of custodial setting required to create a special relationship for 14th Amendment substantive due process purposes.”); *Liebson v. N.M. Corr. Dep’t*, 73 F.3d 274, 276 (10th Cir. 1996) (holding librarian assigned to provide library services to inmates housed in maximum security unit of state penitentiary was not in state’s custody or held against her will; employment relationship was “completely voluntary”); *Lewellen v. Metro. Gov’t of Nashville*, 34 F.3d 345, 348–52 (6th Cir. 1994) (workman accidentally injured on school construction project has no substantive due process claim).

363. 503 U.S. 115 (1992).

364. *Id.* at 130. *See also* Kaucher v. Cnty. of Bucks, 455 F.3d 418, 424–30 (3d Cir. 2006); Estate of Phillips v. District of Columbia, 455 F.3d 397, 406–08 (D.C. Cir. 2006); Walker v. Rowe, 791 F.2d 507, 510–11 (7th Cir. 1986).

365. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989). However, “the line between action and inaction, between inflicting and failing to prevent the infliction of harm,” is not always clear. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992) (quoting *Bowers v. Vito*, 686 F.2d 616, 618 (1st Cir. 1982)).

366. *DeShaney*, 489 U.S. at 200 (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him.”). *See also* *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir.) (en banc) (“By requiring a custodial context as the condition for an affirmative duty, *DeShaney* rejected the idea that such a duty can arise solely from an official’s awareness of a specific risk or from promises of aid.”), *cert. denied*, 516 U.S. 994 (1995).

367. *See, e.g.*, *Okin v. Vill. of Cornwall-on-Hudson Police Dep’t*, 577 F.3d 415, 427–31 (2d Cir. 2009) (issue of fact whether village police implicitly encouraged domestic violence inflicted by boyfriend upon plaintiff); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 235–40 (3d Cir. 2008) (using four-part “enhance danger” test: § 1983 complaint alleged proper “enhance the danger” claims against some defendants though not against others); *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1126 (10th Cir. 2008) (articulating six-part state-created danger test, including that defendant engaged in conscience-shocking conduct that put plaintiff at substantial risk of serious, immediate harm); *King v. E. St. Louis Sch. Dist.* 189, 496 F.3d 812, 817–19 (7th Cir. 2007) (recognizing state-created-danger doctrine, though rejecting its application in particular circumstances); *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 464, 469 (6th Cir. 2006) (relying on *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (state-created-danger doctrine requires showing of “an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability”—namely, “deliberate indifference,” which means “subjective recklessness”); *Pena v. DePrisco*, 432 F.3d 98, 108 (2d Cir. 2005) (adopting state-created danger doctrine); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005) (“Under the state-created danger theory, [plaintiffs] must prove 1) they were members of a limited, precisely definable group, 2) [city’s] conduct put them at significant risk of serious, immediate, and proximate harm, 3) the risk was obvious or known to [city], 4) [city] acted recklessly in conscious disregard of the risk, and 5) in total, [city’s] conduct shocks the conscience.” (citations omitted)); *Estate of Smith v. Marasco*, 430 F.3d 140, 153 (3d Cir. 2005) (“In order to prevail on a state-created danger claim, a plaintiff must prove ‘(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the [harm] to occur.’” (citation omitted)); *Estate of Amos v. City of Page*, 257 F.3d 1086, 1091 (9th Cir. 2001) (“cognizable section 1983 claim under the ‘danger creation’ exception [requires] an *affirmative* act by the police that leaves the plaintiff ‘in a more dangerous position than the one in which they found him’” (emphasis added)). *See also* *Estate*



of *Stevens v. City of Green Bay*, 105 F.3d 1169, 1177 (7th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995) (en banc); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993); *Dwares v. City of N.Y.*, 985 F.2d 94, 99 (2d Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989). *But see* *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 465 (5th Cir. 2010) (stating Fifth Circuit hasn’t adopted state-created-danger theory). Courts of appeals that have adopted the state-created-danger doctrine have not agreed about the test that should govern the claim; for a breakdown by circuit of state-created danger decisions, see 1 Schwartz, *supra* note 246, § 3.09[E].

368. *Collins v. City of Harker Heights*, 503 U.S. 115, 130 (1992).

369. *See, e.g., Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066–67 (6th Cir. 1998) (city officials’ release of personal information about plaintiffs—undercover officers—increased risk of danger to them); *L.W. v. Grubbs*, 974 F.2d 119, 120–21 (9th Cir. 1992) (concluding plaintiff, a registered nurse, stated constitutional claim against defendant-correctional officers, who knew inmate was violent sex offender, likely to assault plaintiff if alone with her, and yet intentionally assigned inmate to work alone with plaintiff in clinic); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989) (holding that where defendants had put plaintiff, a town clerk, in a “unique position of danger” by causing inmates who were inadequately supervised to be present in town hall, then “under the special danger approach as well as the special relationship approach . . . the defendants owed [the plaintiff] a duty to protect her from the harm they created”). *But see* *Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837, 839–40 (11th Cir. 1997) (per curiam) (noting “*Cornelius* may not have survived *Collins v. City of Harker Heights*, where the Supreme Court held that a voluntary employment relationship does not impose a constitutional duty on government employers to provide a reasonably safe work environment,” but holding that even if *Cornelius* has not been undermined, plaintiff did not make out state-created danger claim where “the school neither placed [plaintiff] in a dangerous location nor placed the assailants in the place where [plaintiff] was”).

370. U.S. Const. amend. IV (stating “the right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated”).

371. *See* *Graham v. Connor*, 490 U.S. 386, 388–95 (1989).

372. *Id.* at 395 (citing *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979)).

373. U.S. Const. amend. VIII (stating “cruel and unusual punishments [shall not be] inflicted”).

374. *See* *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992); *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

375. U.S. Const. amend. XIV § 1 (stating that “[n]o State shall . . . deprive any person of life, liberty . . . without due process of law”).

376. *Graham v. Connor*, 490 U.S. 386, 395 (1989). *See also* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842–43 (1998); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion).

377. *Graham*, 490 U.S. at 395 n.10.

378. “[W]hile force found to shock the conscience under the Fourth Amendment will necessarily violate the Fourth Amendment’s reasonableness test, force that does not shock



the conscience may nevertheless be unreasonable under the Fourth Amendment.” *Aldini v. Johnson*, 609 F.3d 858, 867 (6th Cir. 2010).

379. *Cnty. of Sacramento*, 523 U.S. at 842–45. *Cf.* *Scott v. Harris*, 550 U.S. 372, 381 (2007) (termination of high-speed pursuit by ramming pursued vehicle from behind constituted Fourth Amendment “seizure”).

380. *Graham*, 490 U.S. at 395 n.10.

381. *Id.*

382. *See, e.g., Fontana v. Haskin*, 262 F.3d 871, 878–81 (9th Cir. 2011) (applying Fourth Amendment under “continuing seizure” theory); *Aldini*, 609 F.3d at 864–67 (Fourth Amendment’s objective reasonableness standard governs, rather than substantive due process shocks-the-conscience test); *Lopez v. City of Chi.*, 464 F.3d 711, 718–20 (7th Cir. 2006) (holding Fourth Amendment applicable); *Wilson v. Spain*, 209 F.3d 713, 715 & n.2 (8th Cir. 2000) (describing conflict in circuits, and holding Fourth Amendment applicable). *Compare* *Riley v. Dorton*, 115 F.3d 1159, 1163–64 (4th Cir. 1997) (detailing circuit conflict, and holding Fourth Amendment not applicable to “alleged mistreatment of arrestees or pretrial detainees in custody”). *See generally* *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) (stating person had been “seized” within meaning of Fourth Amendment by his arrest and conditional release after posting bail). *See also* 1 Schwartz, *supra* note 246, § 3.12[D][4][b]. As the cases cited in this note show, the trend of appellate court cases is to apply the Fourth Amendment to force used during the period after arrest and before detention.

383. *See Graham*, 490 U.S. at 395–96; *see also* *Brower v. Cnty. of Inyo*, 489 U.S. 593, 595–600 (1989) (determining use of blind roadblock was Fourth Amendment seizure, and remanding to determine, *inter alia*, if seizure was reasonable).

384. *See Graham*, 490 U.S. at 395–96; *Brower*, 489 U.S. at 595–600.

385. *See generally* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842–43 (1998) (stating if police officer’s use of force during high-speed pursuit did not result in seizure, substantive due process analysis is appropriate).

386. *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968).

387. *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *see also* *INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (Stewart & Rehnquist, JJ.).

388. *Brower*, 489 U.S. at 597–99 (use of roadblock to stop fleeing motorist constituted seizure; whether act was intentional is objective inquiry—question is whether reasonable officer would have believed that means used would have caused suspect to stop). *Accord* *Brendelin v. California*, 551 U.S. 249, 254 (2007); *Scott v. Harris*, 550 U.S. 372, 381 (2007). The Court in *Brendelin*, stated that the relevant issue is “the intent of the police objectively manifested.” *Brendelin*, 551 U.S. at 261.

389. *Cnty. of Sacramento*, 523 U.S. at 843–44 (stating no seizure occurred when officer accidentally hit passenger of pursued motorcyclist). Most excessive force claims under the Fourth Amendment involve the infliction of physical injury. However, claims involving psychological injury are also actionable. *See, e.g., McDonald v. Haskins*, 966 F.2d 292, 294–95 (7th Cir. 1992) (holding nine-year-old child stated valid unreasonable force claim under Fourth Amendment by alleging that officer held a gun to child’s head while executing search

warrant, even though child posed no threat to officer and did not attempt to flee); *see generally* Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (psychological harm can constitute “cruel and unusual punishment”) (citing Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir. 1990)) (“guard placing a revolver in inmate’s mouth and threatening to blow prisoner’s head off”).

390. Brooks v. Gaenzle, 614 F.3d 1213, 1219–24 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 1045 (2011).

391. 471 U.S. 1 (1985).

392. *Id.* at 3–4, 9–11. The courts commonly define deadly force pursuant to the Model Penal Code definition of force: carrying a substantial risk of causing death or serious harm. *See, e.g.,* Thomson v. Salt Lake Cnty., 584 F.3d 1304, 1313–14 and 1313 n.1 (10th Cir. 2009).

393. *Garner*, 471 U.S. at 11. *Cf.* Scott v. Harris, 550 U.S. 372 (2007), discussed *infra*, Chapter 5, § V.A.3.

394. *Garner*, 471 U.S. at 11.

395. *Id.* at 21–22.

396. 39 F.3d 912 (9th Cir. 1994).

397. *Id.* at 915. *See also* Gonzalez v. City of Anaheim, 747 F.3d 789, 795 (9th Cir. 2014) (en banc) (principle that summary judgment should be granted sparingly in deadly force cases applies with particular force where officer killed suspect and officers involved in shooting are only remaining witnesses); Cyrus v. Town of Mukwonago, 624 F.3d 856, 862 (7th Cir. 2010) (principle that “summary judgment is often inappropriate in excessive-force cases because the evidence surrounding the officer’s use of force is often susceptible of different interpretations” is “particularly relevant where, as here, the one against whom force was used had died, because the witness most likely to contradict the officer’s testimony—the victim—cannot testify”) (citations omitted); Ingle v. Yelton, 439 F.3d 191, 195 (4th Cir. 2006) (noting that because deceased suspect not available to contradict police officer’s version of events, courts must critically assess all other evidence in case, and “may not simply accept what may be a self-serving account by the police officer”); O’Bert v. Vargo, 331 F.3d 29, 37–38 (2d Cir. 2003) (holding summary judgment should not be granted to defendant officer in deadly force case based solely on what may be officer’s self-serving account of incident; court must “consider ‘circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence would convince rational factfinder that officer acted unreasonably’” (quoting *Scott*, 39 F.3d at 915)); Abraham v. Raso, 183 F.3d 279, 294 (3d Cir. 1999) (because victim of deadly force unable to testify, courts must be cautious on summary judgment to ensure officer not taking advantage of fact victim can’t contradict his story).

398. 490 U.S. 386 (1989).

399. *Id.* at 395. The Court in *Graham* acknowledged that the Fourth Amendment “has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Id.* at 396.

400. *Id.* at 396. *See also* George v. Morris, 736 F.3d 829, 839 (9th Cir. 2013) (fact officers responded to domestic disturbance call is pertinent consideration) (citing Mattos v. Agarano, 661 F.3d 433, 450 (9th Cir. 2011) (en banc)).

401. *Graham*, 490 U.S. at 396–97. *Accord* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). In *Plumhoff*, the Court ruled that “if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.” *Id.* at 2022. Fourth Amendment excessive force claims are subject to qualified immunity. *See* *Saucier v. Katz*, 533 U.S. 194 (2001). *Accord* *Plumhoff*, 134 S. Ct. 2012.

402. *Graham*, 490 U.S. at 397.

403. *Id.*

404. *Id.* at 399 n.12 (officer’s ill will relevant on credibility); *Ricketts v. City of Hartford*, 74 F.3d 1397, 1412 (2d Cir.) (officer’s “evil motive or intent” relevant on punitive damages), *cert. denied*, 519 U.S. 815 (1996).

405. *Bishop v. Hackel*, 636 F.3d 757, 767 (6th Cir. 2011); *Dorsey v. Barber*, 517 F.3d 389, 399 n.4 (6th Cir. 2008).

406. *Brockington v. Boykins*, 637 F.3d 503, 507 (4th Cir. 2011).

407. *See, e.g.,* *English v. District of Columbia*, 651 F.3d 1, 9–10 (D.C. Cir. 2011) (citing *Whren v. United States*, 517 U.S. 806, 815 (1996)); *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3d Cir. 2009); *Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009); *Thompson v. City of Chi.*, 472 F.3d 444, 455 (7th Cir. 2006). *Contra* *Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003), *cert. denied*, 542 U.S. 918 (2004). *But see* *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (due process rights of pretrial detainees: Court stated that correctional standards issued by organizations such as American Correctional Association and National Commission on Correctional Health Care may be instructive, but “do not establish the constitutional minima; rather they establish goals recommended by the organization in question”); *Sheehan v. San Francisco*, 743 F.3d 1211, 1225 (9th Cir. 2014) (in determining reasonableness of use of force, trier of fact may consider expert testimony of general police practices for dealing with mentally ill or emotionally disturbed persons).

408. 550 U.S. 372 (2007).

409. *Id.* at 386.

410. *Id.* at 379–80 (footnotes omitted).

411. *Id.* at 375 (footnote omitted).

412. *Id.* at 381. When termination of a high-speed pursuit does not culminate in a seizure, the officer’s actions are evaluated under a substantive due process, “shocks the conscience” purpose-to-cause-harm standard. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998).

413. A videotape may be considered by the district court only if it has been properly authenticated, which is a condition precedent to admissibility. Fed. R. Evid. 901(a). *See, e.g.,* *Snover v. City of Starke*, 398 F. App’x 445, 449 (11th Cir. 2010) (§ 1983 excessive force claim: “Because the defendants merely filed the DVD with the court and did not authenticate it, the district court did not abuse its discretion in declining to consider the DVD.”) (citing *Asociacion de Periodistas de P.R. v. Mueller*, 529 F.3d 52, 56–57 (1st Cir. 2008)).

414. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

415. *Id.* at 381 n.8.

416. *Id.* at 383.

417. 471 U.S. 1 (1985).

418. *Scott*, 550 U.S. at 382–83 (citations omitted) (following *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989)).

419. *Scott*, 550 U.S. at 382 n.9 (*Garner* “hypothesized that deadly force may be used ‘if necessary to prevent escape’ when the suspect is known to have ‘committed a crime involving the infliction or threatened infliction of serious physical harm,’ so that his mere being at large poses an inherent danger to society.”).

420. *Id.* at 382.

421. *Id.* at 384.

422. *Id.* at 385.

423. *Id.* at 385–86. *Accord* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021 (2014).

424. *Scott*, 550 U.S. at 386 (Ginsburg, J., concurring).

425. *Id.* at 389 (Breyer, J., concurring) (quoting majority opinion).

426. *Id.* (Breyer, J., concurring).

427. *Id.* at 395 (Stevens, J., dissenting).

428. *Id.* at 395–96 (Stevens, J., dissenting).

429. *See, e.g., Harris v. Serpas*, 745 F.3d 767, 770–73 (5th Cir. 2014) (in upholding grant of summary judgment to defendant officers, court relied on “taser video” of incident); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) (relying on facts depicted in videotape, granting summary judgment to defending officers); *Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010) (same); *Wallingford v. Olson*, 592 F.3d 888, 892–93 (8th Cir. 2010) (same); *Collier v. Montgomery*, 569 F.3d 214, 219 (5th Cir. 2009) (same); *Dunn v. Matatall*, 549 F.3d 348, 354–55 (6th Cir. 2008) (same); *Marvin v. City of Taylor*, 509 F.3d 234, 238–49 (6th Cir. 2007) (same); *Beshers v. Harrison*, 495 F.3d 1260, 1263–68 (11th Cir. 2007) (same). *But see* *Witt v. W. Va. State Police*, 633 F.3d 272, 276–77 (4th Cir. 2011) (police cruiser videotape that had no sound and was of poor quality did not blatantly contradict plaintiff’s version of facts; officers not entitled to summary judgment; *Scott* did “not hold that courts should reject a plaintiff’s account on summary judgment whenever documentary evidence, such as a video, offers some support for a governmental officer’s version of events. Rather, *Scott* merely holds that when documentary evidence ‘blatantly contradict[s]’ a plaintiff’s account, ‘so that no reasonable jury could believe it,’ a court should not credit the plaintiff’s version on summary judgment.”) (citation omitted).

For an empirical evaluation of the decision in *Scott v. Harris*, see Dan M. Kahan, David A. Hoffman & Donald Blasman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837 (2009). *See* 1 Schwartz, *supra* note 246, § 3.12[C][D].

430. *See, e.g., Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir.) (recognizing excessively tight handcuffing constitutes excessive force), *cert. denied*, 543 U.S. 956 (2004); *Martin v. Heide-man*, 106 F.3d 1308, 1313 (6th Cir. 1997) (“excessively forceful handcuffing” viewed as excessive force claim).

431. *See, e.g., Moss v. United States Secret Service*, 675 F.3d 1213 (9th Cir. 2012) (use of pepper spray against peaceful, obedient protester violated Fourth Amendment) (relying on *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125 (9th Cir. 2002)); *Tracy v. Freshwater*, 623 F.3d 90, 98–99 (2d Cir. 2010) (based on plaintiff’s version of facts, reasonable jury could find use of pepper spray violated Fourth Amendment). *See also* *Kenney v. Floyd*, 700 F.3d 604, 610 (1st Cir. 2012); *Maxwell v. Cnty. of San Diego*, 697 F.3d 941, 953 (9th Cir. 2012).

432. *See, e.g.*, *Campbell v. City of Springboro*, 700 F.3d 779, 787–89 (6th Cir. 2012) (based on plaintiffs’ version of facts, reasonable jury could find police officer’s deployment of police dog’s “bite and hold” on two suspects was unreasonable and in violation of clearly established Fourth Amendment law; dog’s training was “questionable,” and suspects lying on ground were not threat to anyone when canine unit called in); *Edwards v. Shanley*, 666 F.3d 1289, 1296–97 (11th Cir. 2012) (officer’s use of police dog to track and initially subdue fleeing suspect reasonable; but officer’s use of police dog to attack suspect for 5–7 minutes while suspect pleading to surrender, and officer in position to arrest suspect, was unreasonable).

433. *See, e.g.*, *Estate of Levy v. City of Spokane*, 534 F. App’x 595 (9th Cir. 2013); *Meyers v. Balt. Cnty.*, 713 F.3d 723 (4th Cir. 2013); *Abbott v. Sangamon Cnty.*, 705 F.3d 706 (7th Cir. 2013); *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012); *Hagans v. Franklin Cnty. Sheriff’s Office*, 695 F.3d 505 (6th Cir. 2012); *Marquez v. City of Phoenix*, 693 F.3d 1167 (9th Cir. 2012); *Austin v. Redford Twp. Police Dep’t*, 690 F.3d 490 (6th Cir. 2012); *Carpenter v. Gage*, 686 F.3d 644 (8th Cir. 2012); *Hoyt v. Cooks*, 672 F.3d 972 (11th Cir. 2012); *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2682, 2684 (2012); *Fils v. City of Aventura*, 647 F.3d 1272 (11th Cir. 2011); *McKenney v. Harrison*, 635 F.3d 354 (8th Cir. 2011); *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2010); *Cyrus & Town of Mukwonago*, 624 F.3d 856 (7th Cir. 2010); *Bryan v. McPherson*, 630 F.3d 805 (9th Cir. 2010); *Mann v. Taser Int’l*, 588 F.3d 1291 (11th Cir. 2009); *Oliver v. Fiorino*, 586 F.3d 898 (11th Cir. 2009); *Cook v. City of BellaVilla*, 582 F.3d 840 (8th Cir. 2009); *Lewis v. Downey*, 581 F.3d 467 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1936 (2010); *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009); *Parker v. Gerrish*, 547 F.3d 1 (1st Cir. 2008); *Zivojinovich v. Barner*, 525 F.3d 1059 (11th Cir. 2008).

434. *Matta-Ballestros v. Hennan*, 896 F.3d 255, 256 n.2 (7th Cir. 1990).

435. *See Billington v. Smith*, 292 F.3d 1177, 1187–88 (9th Cir. 2002) (explaining different circuits’ approaches). *See also* 1 Schwartz, *supra* note 246, § 3.12[D].

436. *Harris v. Serpas*, 745 F.3d 767, 772–73 (5th Cir. 2014); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

437. *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996).

438. *Id.*

439. *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996); *accord Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005).

440. *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

441. *Allen v. Muskogee*, 119 F.3d 837, 840–41 (10th Cir. 1997).

442. *Bletz v. Gribble*, 641 F.3d 743, 751 (6th Cir. 2011) (“Whether events leading up to a shooting are legitimate factors to consider in assessing an excessive force claim depends on the totality of the circumstances in question.”) (citing *Livermore v. Lobelan*, 476 F.3d 397 (6th Cir. 2007); *Dickerson v. McCellan*, 101 F.3d 1151 (6th Cir. 1996); *Yates v. City of Cleveland*, 941 F.3d 444 (6th Cir. 1991)).

443. 652 F.3d 524 (4th Cir.) (en banc), *cert. denied*, 132 S. Ct. 781 (2011).

444. *Id.* at 532–33.

445. *Id.* at 535 (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (qualified immunity applies to mistake of law or fact, and to mixed questions of law and fact)).

446. 648 F.3d 1119 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1032 (2012).

447. *Id.* at 1120.

448. *Id.* at 1124.

449. *Id.* at 1127.

450. *Gutierrez v. San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998). *Accord* *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1313–14 & 1313 n.1 (10th Cir. 2009); *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir.) (en banc), *cert. denied*, 545 U.S. 1128 (2005); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998).

451. *See, e.g., Rahn v. Hawkins*, 464 F.3d 813, 817–18 (8th Cir. 2006); *Monroe v. City of Phoenix*, 248 F.3d 851, 859–60 (9th Cir. 2001).

452. *Rahn*, 464 F.3d at 817–18; *Monroe*, 248 F.3d at 859–60.

453. For decisions holding a deadly force instruction not required, *see* *Acosta v. Hill*, 504 F.3d 1323 (9th Cir. 2007) (overruling *Monroe v. City of Phoenix*, 248 F.3d 851 (9th Cir. 2001)); *Blake v. City of N.Y.*, No. 05-Civ. 6652 (BSJ), 2007 U.S. Dist. LEXIS 49160 (S.D.N.Y. July 3, 2007). The Second Circuit, however, held that when force is “highly likely to have deadly effects,” the district court must give a special *Garner* instruction. *Rasanen v. Doe*, 723 F.3d 325, 333 (2d Cir. 2013). *See also* *Terranova v. New York*, 676 F.3d 305, 309 (2d Cir.), *cert. denied*, *Terranova v. Torres*, 184 L. Ed. 2d 156 (2012) (“absent evidence of the use of force highly likely to have deadly effects, as in *Garner*, a jury instruction regarding justifications for the use of deadly force is inappropriate, and the usual instructions regarding the use of excessive force are adequate”).

454. *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005); *accord* *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005). *See also* *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1252–57 (10th Cir. 2013) (when qualified immunity is not at issue and there are disputed issues of material fact, reasonableness of officer’s use of force is for jury).

455. *See* *Scott v. Harris*, 550 U.S. 372 (2007); *Untalan v. City of Lorain*, 430 F.3d 312, 314–17 (6th Cir. 2005) (upholding district court’s decision to grant defendant police officer’s summary judgment motion based on qualified immunity because, based on evidence, no reasonable juror could find that officer violated decedent’s Fourth Amendment rights).

456. *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (stressing “the importance of resolving immunity questions at the earliest possible stage in litigation”). *See infra* Chapter 16.

457. *Scott*, 550 U.S. at 378–81.

458. *Sanchez v. City of Chi.*, 700 F.3d 919, 926 (7th Cir. 2012) (citations omitted). *See also* *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 416–19 (4th Cir. 2014).

459. 463 U.S. 239 (1983).

460. *Id.* at 244.

461. *Id.* Regardless of the constitutional standard, the city of Revere “fulfilled its constitutional obligation by seeing that [the arrestee] was taken promptly to a hospital that” treated his injuries. *Id.* at 245.

462. *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976).

463. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 758 (7th Cir. 2005); *Watkins v. City of Battle Creek*, 273 F.3d 682, 685–86 (6th Cir. 2001); *Napier v. Madison Cnty.*, 238 F.3d 739, 742 (6th Cir. 2001); *Wagner v. Bay City*, 227 F.3d 316, 324 (5th Cir. 2000); *Horn v. Madison Cnty. Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994).

464. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). *Accord* *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986).
465. *Whitley*, 475 U.S. at 321–22.
466. *Hudson*, 503 U.S. at 6–10.
467. 475 U.S. 312 (1986).
468. *Id.* at 321.
469. *See id.* at 320; *accord Hudson*, 503 U.S. at 6.
470. 503 U.S. 1 (1992).
471. *Id.* at 9.
472. *Id.* at 9–10 (citation omitted).
473. 130 S. Ct. 1175 (2010) (per curiam).
474. *Id.* at 1178.
475. *Id.* at 1180. “An inmate who complains of a ‘push or shove’ that causes no discernible injury almost certainly fails to state a valid excessive force claim.” *Id.* at 1178.
476. *Id.* at 1178–79.
477. *Whitley v. Albers*, 475 U.S. 312, 322 (1986).
478. 490 U.S. 386 (1989).
479. 441 U.S. 520 (1979).
480. *Graham*, 490 U.S. at 395 n.10 (dictum).
481. 523 U.S. 833 (1998).
482. *Id.* at 846–47 (citing *Rochin v. California*, 342 U.S. 165, 172–73 (1952)).
483. *Id.* at 836.
484. *Id.* at 852–53.
485. *See* 1 Schwartz, *supra* note 246, § 3.16[A].
486. *O’Connor v. Huard*, 117 F.3d 12 (1st Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).
487. *Fennell v. Gilstrap*, 559 F.3d 1212 (11th Cir. 2009); *Carr v. Deeds*, 453 F.3d 593, 605 (4th Cir. 2006); *Fuentes v. Wagner*, 206 F.3d 335, 347–48 (3d Cir. 2000); *Valencia v. Wiggins*, 981 F.2d 1440, 1445–46 (5th Cir. 1993). *See also* *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999).
488. *Tesch v. City of Green Lake*, 157 F.3d 465 (7th Cir. 1998). *See also* *Kingsley v. Hendrickson*, 744 F.3d 443 (7th Cir. 2014).
489. *See* compilation of courts of appeals decisions, 1 Schwartz, *supra* note 246, § 3.16[A][1].
490. *Bell*, 441 U.S. at 535–39.
491. *O’Connor*, 117 F.3d 12.
492. *Seizure of Property*: Although much less common than § 1983 challenges to arrests and searches, a § 1983 Fourth Amendment claim can be based upon a law enforcement officer’s seizure of property. *Soldal v. Cook Cnty.*, 506 U.S. 56, 61, 71 (1992) (holding deputy sheriffs’ removal of trailer from mobile home park was a seizure, which “occurs when ‘there is some meaningful interference with an individual’s possessory interests in that property’”; seizure must be reasonable, requiring “balancing of governmental and private interests”).
493. 116 U.S. 616 (1886).
494. *See* *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996); *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 118–19 (2d Cir. 1995).



495. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); *accord* *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003).

496. *Woods v. City of Chi.*, 234 F.3d 979, 997 (7th Cir.), *cert. denied*, 534 U.S. 955 (2001).

497. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

*Mass Arrests*: When the police arrest a large number of individuals who participated in a mass protest, the police must have “a reasonable belief that the entire crowd is acting as a unit and therefore all members of the crowd violated the law.” *Carr v. District of Columbia*, 587 F.3d 401, 408 (D.C. Cir. 2009). *See also* *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir.), *cert. denied*, 133 S. Ct. 526 (2012).

498. *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004).

499. *Virginia v. Moore*, 553 U.S. 164 (2008). Furthermore, the Court in *Moore* held that a search incident to such an arrest complies with the Fourth Amendment.

*Continued Detention of Arrestee*: If the state seeks to hold a suspect who was subject to a warrantless arrest, the Fourth Amendment requires a probable cause determination from a magistrate judge within a reasonable time. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Forty-eight hours is a presumptively reasonable time. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

500. *Payton v. New York*, 445 U.S. 573, 587–88 (1980). *See also* *Steagald v. United States*, 451 U.S. 204, 205–06 (1981) (as general rule police cannot lawfully search for subject of arrest warrant in third-party’s home without search warrant). An in-home arrest without a warrant is constitutional only if the officer either gets consent to enter the home or reasonably finds exigent circumstances. *Payton*, 445 U.S. at 587–88. *See also* *Ryburn v. Huff*, 132 S. Ct. 987, 991–92 (2012) (per curiam) (officers who made warrantless entry in home protected by qualified immunity because they had objectively reasonable belief violence was imminent); *Michigan v. Fisher*, 130 S. Ct. 546, 548–49 (2009) (“exigent circumstances” evaluated on objective basis without regard to officers’ subjective intent; emergency aid exception allows officers to enter home without warrant to render emergency assistance to injured occupant or to protect occupant from imminent injury); *Brigham City v. Stuart*, 547 U.S. 398, 403–06 (2006) (law enforcement officer may enter home without warrant if officer reasonably believes entry needed to render emergency assistance “to injured occupant or to protect an occupant from imminent injury”).

501. *See* *Davis v. Rodriguez*, 364 F.3d 424, 434 n.8 (2d Cir. 2004) (describing circuit conflict).

502. *See, e.g.,* *Dubner v. San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001); *Rankin v. Evans*, 133 F.3d 1425, 1436 (11th Cir. 1998); *Larez v. Holcomb*, 16 F.3d 1513, 1517 (9th Cir. 1994).

503. *Larez*, 16 F.3d at 1517.

504. *Dubner*, 266 F.3d at 965.

505. *Karr v. Smith*, 774 F.2d 1029, 1031 (10th Cir. 1985).

506. *See, e.g.,* *Raysor v. Port Auth.*, 768 F.2d 34, 40 (2d Cir. 1985) (“defendant has the burden of proving that the arrest was authorized”).

507. *See, e.g.,* *Sutton v. Metro. Gov’t of Nashville & Davidson Cnty.*, 700 F.3d 865, 872–76 (6th Cir. 2012).



508. 392 U.S. 1 (1968).

509. *Id.* at 21.

510. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

511. *Terry*, 392 U.S. at 30.

512. *Whren v. United States*, 517 U.S. 806, 810–16 (1996). Section 1983 challenges to stops and frisks are subject to the defense of qualified immunity. *See, e.g., Jewett v. Anders*, 521 F.3d 818, 823 (7th Cir. 2008).

513. *United States v. Arvizu*, 534 U.S. 266 (2002); *Florida v. J.L.*, 529 U.S. 266 (2000); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Alabama v. White*, 496 U.S. 325 (1990); *United States v. Sokolow*, 490 U.S. 1 (1989).

514. For a recent example of a case involving strip searches of detainees, see *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (holding in routine “strip searches” of detainees charged with minor offenses and placed in general jail populations, Fourth Amendment does not require individualized reasonable suspicion).

515. For in-depth coverage, see Wayne R. LaFare, *Search and Seizure, A Treatise on the Fourth Amendment* (5th ed. West 2012).

516. *General Definition of “Search”*: *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Jones v. United States*, 132 S. Ct. 945 (2012); *Katz v. United States*, 389 U.S. 347 (1967).

*Aerial Surveillance*: *Florida v. Riley*, 488 U.S. 445 (1989); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207 (1986).

*Automobile Exception*: *California v. Carney*, 471 U.S. 386 (1980); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

*Bank Records*: *United States v. Miller*, 425 U.S. 435 (1976).

*Beeper Tracking*: *Karo v. United States*, 468 U.S. 705 (1984); *Knotts v. United States*, 460 U.S. 276 (1983).

*Automobile Checkpoints*: *Illinois v. Lidster*, 540 U.S. 419 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990); *Delaware v. Prouse*, 440 U.S. 648 (1979).

*Consent Searches*: *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). *See also* *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Georgia v. Randolph*, 547 U.S. 103 (2006); *Florida v. Jimeno*, 500 U.S. 248 (1991); *Bumper v. North Carolina*, 391 U.S. 543 (1968).

*Closely Regulated Business*: *New York v. Burger*, 482 U.S. 691 (1987).

*Curtilege*: *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Dunn*, 480 U.S. 294 (1987).

*Dog Sniffs*: *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (front porch); *Illinois v. Caballes*, 543 U.S. 405 (2006) (car); *United States v. Place*, 462 U.S. 696 (1983) (luggage).

*Drug Testing*: *Bd. of Educ. of Indep. Sch. Dist. No. 92 Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002) (students); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (pregnant women); *Chandler v. Miller*, 520 U.S. 305 (1997) (candidates for public office); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (students); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602 (1989) (railway workers); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (U.S. Customs Service employees).

*Exigent Circumstances:* Ryburn v. Huff, 132 S. Ct. 987 (2012) (per curiam); Michigan v. Fisher, 130 S. Ct. 546 (2009); Brigham City v. Stuart, 547 U.S. 398 (2006). *See also* Kentucky v. King, 131 S. Ct. 1849 (2011).

*GPS Tracking:* Jones v. United States, 132 S. Ct. 945 (2012).

*Home:* Kyllo v. United States, 533 U.S. 27 (2001) (thermal images); Steagald v. United States, 451 U.S. 204 (1981) (search for arrestee in home of another); Payton v. New York, 445 U.S. 573 (1980) (search for arrestee in arrestee's home).

*Housing and Building Code Inspections:* Camara v. Mun. Court of S.F., 387 U.S. 523 (1987) (housing code); See v. City of Seattle, 387 U.S. 541 (1967) (building code). *See also* Michigan v. Tyler, 436 U.S. 499 (1978) (fire inspector's inspection of fire-damaged property).

*Inventory Searches:* Colorado v. Bertine, 479 U.S. 367 (1987); Illinois v. Lafayette, 462 U.S. 640 (1983); South Dakota v. Opperman, 428 U.S. 364 (1976).

*Luggage:* Bond v. United States, 529 U.S. 334 (2000); United States v. Place, 462 U.S. 696 (1983).

*Open Fields:* Oliver v. United States, 466 U.S. 170 (1984). *See also* United States v. Dunn, 480 U.S. 294 (1987).

*Parolees and Probationers:* Samson v. California, 547 U.S. 843 (2006) (parolees); United States v. Knights, 534 U.S. 112 (2001) (probationers).

*Pen Register:* Smith v. Maryland, 442 U.S. 735 (1979).

*Probable Cause to Search:* Florida v. Harris, 133 S. Ct. 1050 (2013); Illinois v. Gates 462 U.S. 213 (1983).

*Search Incident to Arrest:* Riley v. California, 189 L. Ed.2d 430 (2014) (search of cell phone digital information incident to arrest); Arizona v. Gant, 556 U.S. 332 (2009) (arrest of driver or passenger); United States v. Robinson, 414 U.S. 218 (1973) (arrest in public place); Chimel v. California, 395 U.S. 752 (1969) (arrest in home).

*Students:* Safford Unified Sch. Dist. # 1 v. Redding, 557 U.S. 364 (2009); New Jersey v. T.L.O., 469 U.S. 325 (1985). *See also* decisions cited under "Drug Testing."

*Trash Placed at Curb for Collection:* California v. Greenwood, 486 U.S. 35 (1988).

*Workplace:* City of Ontario v. Quon, 130 S. Ct. 2619 (2010); O'Connor v. Ortega, 480 U.S. 709 (1987).

517. *Compare, e.g.,* Der v. Connolly, 666 F.3d 1120, 1126–29 (8th Cir. 2012) (§ 1983 plaintiff challenging warrantless search of home bears burden of showing she did not knowingly and voluntarily consent to entry into home, and objectively unreasonable for officer to believe emergency justified entry into home), *and* Bogan v. City of Chi., 644 F.3d 563, 568–71 (7th Cir. 2011) (in § 1983 challenge to warrantless search in which defendants alleged exigent circumstances, plaintiff has ultimate burden of persuasion to establish Fourth Amendment violation, including showing search not justified by exigent circumstances), *cert. denied*, 132 S. Ct. 1538 (2012), *with* Armijo v. Peterson, 601 F.3d 1065, 1070 (10th Cir. 2010) (per curiam) (burden on defendant-officer to establish exigent circumstances). *See also* Am. Fed'n of State, Cnty. & Mun. Emps. v. Scott, 717 F.3d 851, 880 (11th Cir. 2013) (plaintiff bears burden of persuasion on every element of § 1983 claim).

518. Logsdon v. Hains, 492 F.3d 334, 341 (6th Cir. 2007), *cert. denied*, 555 U.S. 811 (2008); Radvansky v. City of Olmsted Falls, 395 F.3d 291, 302 (6th Cir. 2005). *See* Montgomery v. De Simone, 159 F.3d 120, 124 (3d Cir. 1998).

519. *Estate of Smith v. Marasco*, 318 F.3d 497, 514 (3d Cir. 2003) (citation omitted). *Accord Walczyk v. Rio*, 496 F.3d 139, 157 (2d Cir. 2007) (where facts not in dispute, existence of probable cause is issue of law for court).

520. *See infra* Chapter 16.

521. 544 U.S. 93 (2005).

522. *Id.* at 95, 98–101.

523. 452 U.S. 692 (1981).

524. *Muehler*, 544 U.S. at 98.

525. *Summers*, 452 U.S. at 705 & n.19. *See also* *Bailey v. United States*, 133 S. Ct. 1031 (2013) (*Summers* rule applies only to persons in immediate vicinity of premises).

526. *Muehler*, 544 U.S. at 95, 98–99.

527. *Id.* at 100. When the *Muehler* safety interests are absent, continued handcuffing during the execution of a search warrant may constitute excessive force. *See, e.g.*, *Bletz v. Gribble*, 641 F.3d 743, 755 (6th Cir. 2011); *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010).

528. *Muehler*, 544 U.S. at 103–04 (Kennedy, J., concurring).

529. *Id.* at 100–01.

530. 510 U.S. 266 (1994).

531. *Id.* at 270 n.4. Some courts had also required the challenged governmental conduct to be “egregious.” *Id.*

532. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 (1st Cir. 1996).

533. *Wallace v. Kato*, 549 U.S. 384, 390, n.2 (2007).

534. *See* 1 Schwartz, *supra* note 246, § 3.18. *See, e.g.*, *Nieves v. McSweeney*, 241 F.3d 46, 53–54 (1st Cir. 2001) (malicious prosecution claim may not be based upon substantive due process).

535. *Albright*, 510 U.S. at 276–79 (Ginsburg, J., concurring).

536. *Id.* at 285–86 (Kennedy, J., concurring).

537. *Id.* at 283.

538. *Id.* at 285–86. The Seventh Circuit takes the position that a § 1983 malicious prosecution claim does not lie when state law provides an adequate remedy for pursuing the claim in state court. *Fox v. Hayes*, 600 F.3d 819, 841 (7th Cir. 2010); *Parish v. City of Chi.*, 594 F.3d 551, 552 (7th Cir. 2009); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). *But see* *Julian v. Hanna*, 732 F.3d 842, 847–48 (7th Cir. 2013) (Indiana law doesn’t provide adequate state law remedy); *see also Nieves*, 241 F.3d at 53.

539. *Albright*, 510 U.S. at 286–87 (Souter, J., concurring).

540. *Id.* at 289.

541. *Id.* at 290–91.

542. *Id.* at 302–06 (Stevens, J., dissenting).

543. *Kerr v. Lyford*, 171 F.3d 330, 342 (5th Cir. 1999) (concurring opinion). *See also* *Wallace v. Kato*, 549 U.S. 384, 390, n.2 (2007) (citing 1 Schwartz, Section 1983 Litigation, § 3.18[C], pp. 3-605 to 3-629); *Becker v. Kroll*, 494 F.3d 904, 913 (10th Cir. 2007) (referring to “murky waters” of § 1983-based malicious prosecution claims).

544. 1 Schwartz, *supra* note 246, § 3.18.

545. See, e.g., *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010); *Manganiello v. City of N.Y.*, 612 F.3d 149, 160–61 (2d Cir. 2010).

*Probable Cause*: Probable cause to prosecute renders a seizure reasonable. *Durham v. Horner*, 690 F.3d 183, 189 (4th Cir. 2012). Probable cause exists when a reasonable person can conclude that there are “lawful grounds for prosecuting the defendant in the manner complained of.” *Rounseville v. Zahl*, 13 F.3d 625, 629–30 (2d Cir. 1994). A grand jury indictment is generally considered conclusive evidence of probable cause, but will not “shield a police officer who deliberately supplied misleading information that influenced the [grand jury’s] decision.” *Durham*, 690 F.3d at 189 (quoting *Goodwin v. Metts*, 885 F.2d 157, 162 (4th Cir. 1989)).

*Malice*: In *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010), the Sixth Circuit found that a plaintiff asserting such a claim must prove: (1) “that a criminal prosecution was initiated against the plaintiff and” that the defendant made, influenced, or participated in the decision to prosecute; (2) a lack of probable cause for the prosecution; (3) “a deprivation of liberty,” as understood in our Fourth Amendment jurisprudence, apart from the initial seizure”; and (4) resolution of the criminal prosecution in favor of the accused. *Id.* at 308–09. The court joined the Fourth Circuit in holding that malice is not an element of the claim. See *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996). The Second, Third, Ninth, Tenth, and Eleventh Circuits have ruled that malice is an element of a § 1983 malicious prosecution claim. See, e.g., *Manganiello*, 612 F.3d at 160–61; *McKenna v. City of Phila.*, 582 F.3d 447, 461 (3d Cir. 2009); *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009); *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1526 (2009); *Grider*, 618 F.3d at 1256 & n.24. The Third Circuit defined malice in the malicious prosecution context as “ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose.” *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). “Malice may be inferred from the absence of probable cause.” *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993).

The court in *Sykes* reasoned that characterizing the § 1983 claim as one for malicious prosecution is “unfortunate and confusing.” The claim requires a showing of an unreasonable seizure under the Fourth Amendment, a claim not concerned with malice. The court stressed that to distinguish the “malicious prosecution” claim from a false arrest claim, it is necessary to determine whether there was probable cause to initiate the prosecution. Further, an officer may be responsible for commencing a criminal proceeding even if she did not make the decision to prosecute if she influenced or participated in that decision.

*Favorable Transaction*: For a criminal prosecution to terminate in favor of the accused, the final determination must “indicate the innocence of the accused.” *Murphy v. Lynn*, 118 F.3d 938, 948 (2d Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998). For example, an adjournment in contemplation of dismissal is not considered a “favorable termination.” *Id.* at 949.

546. *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (noting split on which Fourth, Fifth, Sixth, and Tenth Circuits have adopted purely Fourth Amendment approach to § 1983 malicious prosecution claims, while Second, Third, Ninth, and Eleventh Circuits “have adopted a blended constitutional/common law approach, requiring the plaintiff to demonstrate a Fourth Amendment violation *and* all the elements of a common law malicious prosecution claim”; First Circuit adopted pure Fourth Amendment approach).

547. *Kossler v. Crisanti*, 564 F.3d 181 (3d Cir. 2009).

548. *Post-Albright* § 1983 malicious prosecution decisions by circuit:

- *First Circuit*: *Hernandez-Cuevas v. Taylor*, 723 F.3d 91 (1st Cir. 2013); *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001)
- *Second Circuit*: *Manganiello v. City of N.Y.*, 612 F.3d 149 (2d Cir. 2010)
- *Third Circuit*: *Kossler v. Crisanti*, 564 F.3d 181 (3d Cir. 2009)
- *Fourth Circuit*: *Lambert v. Williams*, 223 F.3d 257 (4th Cir. 2000), *cert. denied*, 531 U.S. 1130 (2001)
- *Fifth Circuit*: *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc), *cert. denied*, 543 U.S. 808 (2004)
- *Sixth Circuit*: *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010)
- *Seventh Circuit*: *Julian v. Hanna*, 732 F.3d 842 (7th Cir. 2013); *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001) (en banc)
- *Eighth Circuit*: *Kurtz v. City of Shrewsbury*, 245 F.3d 753 (8th Cir. 2001)
- *Ninth Circuit*: *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) (en banc)
- *Tenth Circuit*: *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004)
- *Eleventh Circuit*: *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir.), *cert. denied*, 543 U.S. 919 (2004)
- *D.C. Circuit*: *Pitt v. District of Columbia*, 491 F.3d 494 (D.C. Cir. 2007)

*Malicious Abuse of Civil Process*: The prevailing view is that “section 1983 liability . . . may not be predicated on a claim of malicious abuse of . . . civil process.” *Green v. Mattingly*, 585 F.3d 97, 104 (2d Cir. 2009). *See, e.g., Hickson v. Marina Assocs.*, 743 F. Supp. 2d 362, 372–73 (D.N.J. 2010):

A section 1983 claim for malicious abuse of process lies where prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law. The crux of this action is the perversion of the legal process to achieve an objective other than its intended purpose. When process is used to effect an extortionate demand, or to cause the surrender of a legal right, . . . a cause of action for abuse of process can be maintained. . . . [T]here must be some proof of a definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process.

(quoting *Ference v. Twp. of Hamilty*, 538 F. Supp. 2d 785, 798 (D.N.J. 2008)).

549. *See Sykes*, 625 F.3d at 310 (designating constitutional claim as “malicious prosecution” claim is unfortunate and confusing); *Tully v. Barada*, 599 F.3d 591, 595 (7th Cir. 2010) (citing Martin A. Schwartz, 1 Section 1983 Litigation § 3.18[a] (2008 Supplement)).

550. *Wilson v. Seiter*, 501 U.S. 294, 298–303 (1991).

551. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

552. *Id.*

553. *Id.*

554. 429 U.S. 97 (1976).

555. *Id.* at 106. *See also De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013).

556. *Id.* at 105–06. In *Brown v. Plata*, 131 S. Ct. 1910 (2011), the Supreme Court affirmed an order of a three-judge court convened pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626, that found that California prison officials engaged in systemic constitutional

denials of medical and mental health care to prisoners, because of severe overcrowding. The order required California to reduce its prison population by as many as 46,000 prisoners.

557. 692 F.3d 564 (7th Cir. 2012).

558. *Id.* at 567–69.

559. *Id.* at 568.

560. *Id.* at 569. Conversely, a jury should not be instructed on liability in a “damages only” trial. *Guzman v. City of Chi.*, 689 F.3d 740, 746–48 (7th Cir. 2012).

561. 501 U.S. 294 (1991).

562. *Id.* at 302–03.

563. *Id.* at 300–03.

564. *Id.* at 304–05.

565. *Id.*

566. *Id.* at 305.

567. *Id.* at 301–02.

568. *Id.* at 311 & n.2 (White, J., concurring).

569. 509 U.S. 25 (1993).

570. *Id.* at 32–35.

571. *Id.*

572. 511 U.S. 825 (1994).

573. *Id.* at 829 (“requiring a showing that the official was subjectively aware of the risk”).

574. *Id.* at 832–34.

575. *Id.* at 837–38.

576. *Id.* at 835.

577. *Id.* at 837–38.

578. *Id.* at 843 n.8.

579. *Id.* at 842.

580. *Hudson v. McMillian*, 503 U.S. 1 (1992) (discussed *supra* Chapter 4, § V.B).

581. *See id.* at 5–7.

582. *Id.* at 6.

583. *Id.* at 5–6.

584. 427 U.S. 347 (1976).

585. 445 U.S. 507 (1980).

586. *Id.* at 518. Some courts, however, still refer to the “policy-making” exception. *See, e.g., Embry v. City of Calumet City*, 701 F.3d 231, 235 (7th Cir. 2012) (“exception applies not only when a new political party takes power, but also includes ‘patronage dismissals when one faction of a party replaces another faction of the same party’”) (quoting *Tomczak v. City of Chi.*, 765 F.2d 633, 640 (7th Cir. 1985)).

587. *Id.* *See Wilhelm v. City of Calumet City*, 409 F. Supp. 2d 991, 999 (N.D. Ill. 2006) (citing *Lohorn v. Michael*, 913 F.2d 327, 334 (9th Cir. 1998)).

588. 497 U.S. 62 (1990).

589. *Id.* at 74–75.

590. *Id.* at 74.

591. For an analysis of these cases, *see* 1 Schwartz, *supra* note 246, § 3.11[D].

592. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), discussed *infra* text accompanying notes 1069–70.

593. *Soto-Padro v. Public Bldgs. Auth.*, 675 F.3d 1, 6 (1st Cir. 2012).

594. *Barry v. Moran*, 661 F.3d 696, 708 (1st Cir. 2011).

595. *Id.* (quoting *Stratton v. Dep’t for the Aging for City of N.Y.*, 132 F.3d 869, 880 (2d Cir. 1997)).

596. *Barry*, 661 F.3d at 708.

597. 518 U.S. 712 (1996).

598. *Id.* at 722–23.

599. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

600. *See Connick v. Meyers*, 461 U.S. 138 (1983).

601. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

602. *Connick*, 461 U.S. 138. A public employee’s lawsuit or other formal grievance is protected by the First Amendment Petition Clause only if it is a matter of public concern. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).

603. *Connick*, 461 U.S. at 147–48. *See also Lane v. Franks*, 189 L. Ed. 2d 312 (2014).

604. *Connick*, 461 U.S. at 147–48

605. *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996). *See also Lane*, 189 L. Ed. 2d at 325 (to be matter of public concern, speech must be subject of legitimate news interest, that is, of general interest and concern to the public).

606. *See, e.g., Sousa v. Roque*, 578 F.3d 164, 170, 174 (2d Cir. 2009); *Milwaukee Deputy Sheriff’s Ass’n v. Clarke*, 574 F.3d 370, 377 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1059 (2010).

607. *Connick*, 461 U.S. at 147 n.7. When the public concern issue is close, a court may assume *arguendo* that the speech was of public concern and proceed directly to “*Pickering* balancing” (referring to *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)); *Blackman v. N.Y. City Transit Auth.*, 491 F.3d 95, 97, 99–100 (2d Cir. 2007).

608. *Waters v. Churchill*, 511 U.S. 661, 678–79 (1994) (O’Connor, J.) (plurality opinion joined by Rehnquist, C.J., Souter & Ginsburg, JJ.).

609. *Id.* at 677–79.

610. *Id.* at 678 (plurality opinion).

611. *Id.*

612. 547 U.S. 410 (2006).

613. *Id.* at 421–25.

614. *Id.* at 424–25.

615. 189 L. Ed. 2d 312 (2014).

616. *Id.* at 323.

617. *Id.* at 324. The Court in *Lane* found that the subpoenaed testimony in question was clearly a matter of public concern because it pertained to public corruption from misuse of state funds. Further, *Pickering* balancing, discussed at pages 71–72, clearly favored the § 1983 plaintiff. Nevertheless, the defendant, who was sued in his personal capacity for money damages, was protected from liability by qualified immunity because the First Amendment law as to whether a public employee’s subpoenaed testimony is protected speech was not clearly established when the defendant fired the plaintiff.



618. See *Fox v. Traverse City Area Pub. Sch. Bd. of Ed.*, 605 F.3d 345, 350–51 (6th Cir.), *cert. denied*, 131 S. Ct. 643 (2010); *Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007).

619. See *Andrew v. Clark*, 561 F.3d 261, 266–68 (4th Cir. 2009).

620. See *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008); *Foraker v. Claffinch*, 501 F.3d 231, 240 (3d Cir. 2007). The Supreme Court has not determined, and the courts of appeals disagree, about how *Pickering* balancing should apply to the speech of a policy-making or confidential employee. See *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1347–49 (11th Cir. 2013) (citing *inter alia* three lines of appellate authority).

621. See 1 Schwartz, *supra* note 246, § 3.11.

622. 391 U.S. 563 (1968).

623. *Id.* at 570 n.3. “[T]o trigger the *Pickering* balancing test, a public employee must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff’s performance or impaired working relationships.” *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007).

624. *Connick v. Meyers*, 461 U.S. 138, 151–52 (1983).

625. *Rankin v. McPherson*, 483 U.S. 378, 390–91 (1987). See also *Lane v. Franks*, 189 L. Ed. 2d 312, 326 (2014).

626. *Jackson v. Ala.*, 405 F.3d 1276, 1285–86 (11th Cir. 2005); *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999). The court in *Jackson*, 405 F.3d at 1285, acknowledged that *Pickering* balancing may generate subsidiary issues of fact.

627. See, e.g., *Diaz-Bigio v. Santini*, 652 F.3d 45, 53 (1st Cir. 2011); *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 2002); *Brewster v. Bd. of Educ.*, 149 F.3d 971, 980 (9th Cir. 1998).

628. See *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (in which the Court analyzed the so-called “dual motive” issue).

629. A prisoner’s filing of a judicial proceeding or prison grievance is constitutionally protected activity. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996); *Franco v. Kelly*, 854 F.2d 584, 590 (2d Cir. 1988).

630. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001); *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000). See also *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005).

631. *Rauser*, 241 F.3d at 333 (quoting *Allah*, 229 F.3d at 224–25). *Accord Rhodes*, 408 F.3d at 568–69. See also *Santiago v. Blair*, 707 F.3d 984, 993–94 (8th Cir. 2013) (First Amendment claim that adverse prison conditions were imposed on prisoner in retaliation for prisoner’s exercise of First Amendment rights is not governed by *Sandin v. Conner*, 515 U.S. 472 (1995), “atypical and significant hardship” standard; *Sandin* governs due process liberty interest issue).

632. *Mays v. Springborn*, 719 F.3d 631, 633–35 (7th Cir. 2013) (ruling that even if prisoner makes this showing, defendant will prevail if he shows, by preponderance of evidence, that same adverse action would have been taken even if there had been no retaliatory motive). See *Moots v. Lombardi*, 453 F.3d 1020, 1023 (8th Cir. 2006) (“[A] defendant may successfully defend a [prisoner’s] retaliatory discipline claim by showing ‘some evidence’



that the inmate actually committed a rule violation. . . . The fact that the conduct violation was later expunged does not mean that there was not some evidence for its imposition.”).

633. *See* *Watkins v. Kasper*, 599 F.3d 791, 794–97 (7th Cir. 2010) (prisoner employee who asserts First Amendment retaliation claim need not demonstrate that his speech was of public concern, but must show that speech was consistent with legitimate penological interests); *Bridges v. Gilbert*, 557 F.3d 541, 550–51 (7th Cir. 2009) (prisoner asserting free speech retaliation claim need not establish speech was of public concern).

634. *Rauser*, 241 F.3d at 333.

635. *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001).

636. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983).

637. “[W]here . . . circumstantial evidence of a retaliatory motive is sufficiently compelling, direct evidence is not invariably required.” *Bennett v. Goord*, 343 F.3d 133, 139 (2d Cir. 2003).

638. *Gayle v. Gonyea*, 313 F.3d 677, 684 (2d Cir. 2002).

639. 547 U.S. 250 (2006) (*Bivens* action).

640. *Hartman*, 547 U.S. at 261–62. *See also infra* Chapter 15, § II.C.

In a subsequent decision, *Hartman v. Moore*, the D.C. Circuit Court of Appeals followed unanimous circuit court authority holding that a grand jury indictment is *prima facie*, not conclusive, evidence of probable cause, which can be rebutted. *Moore v. Hartman*, 571 F.3d 62, 67 (D.C. Cir. 2009).

641. *Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012) (citing *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010); *Phillips v. Irvin*, 222 F. App’x 928, 929 (11th Cir. 2007) (*per curiam*); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006)). *See also* *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008).

642. *Howards v. McLaughlin*, 634 F.3d 1131, 1145–49 (10th Cir. 2011), *rev’d on other grounds*, *Reichle*, 132 S. Ct. at 2096. *See also* *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1233–35 (9th Cir. 2006) (alleged search and seizure of property in retaliation for exercise of First Amendment rights states proper claim even if search and seizure supported by probable cause).

643. 132 S. Ct. 2088 (2012).

644. *Id.* at 2096.

645. *Id.* at 2095 (citation omitted).

646. *See* *Thayer v. Chiczewski*, 697 F.3d 514 (7th Cir. 2012). Relying on *Reichle*, 132 S. Ct. 2095–97, the Seventh Circuit ruled that qualified immunity defeated the retaliatory arrest claim. “Probable cause, if not a complete bar to Thayer’s First Amendment retaliatory arrest claim, provides strong evidence that he would have been arrested regardless of any illegitimate animus.” *Thayer*, 697 F.3d at 529.

647. 528 U.S. 562 (2000).

648. *Id.* at 564.

649. *Id.* at 565. Dismissal of a “class-of-one” claim is proper when the plaintiff offers only conclusory allegations of similarly situated persons. *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1220 (10th Cir. 2011). The Seventh Circuit recognized that whether others are similarly situated could create a genuine issue of material fact, but found, in the case

at hand, that the district court properly resolved the issue on summary judgment. *Harvey v. Town of Merrillville*, 649 F.3d 526, 531–32 (7th Cir. 2011).

650. 553 U.S. 591 (2008).

651. *Id.* at 603.

652. *Id.* at 599.

653. *Geinosky v. City of Chi.*, 675 F.3d 743, 747 (7th Cir. 2012) (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1009 (7th Cir. 2004)). *See also* *Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007) (class-of-one claim not “vehicle for federalizing run-of-the-mine zoning, environmental, and licensing decision”).

654. *Thayer v. Chiczewski*, 697 F.3d 514, 532 (7th Cir. 2012). For a breakdown by circuit, see 1 Schwartz, *supra* note 246, § 3.10[B].

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655. 448 U.S. 1 (1980).

656. *See, e.g.*, *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120–21 (2005); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 10–11 (1981).

657. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103 (1989)). *Accord* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002).

658. *Blessing*, 520 U.S. at 340 (citing *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430 (1987)).

659. *Id.* at 340–41 (quoting *Wright*, 479 U.S. at 430).

660. *Id.* at 341 (citing *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 500 (1990); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

661. *Blessing*, 520 U.S. at 342.

662. 451 U.S. 1 (1981).

663. *Id.* at 18 (citing former § 6010, which is now § 6009).

664. *Id.*

665. *Id.* at 17.

666. *Id.* at 23.

667. *Id.* at 20.

668. *Id.* at 10–11.

669. 493 U.S. 103 (1989).

670. *See* 29 U.S.C. §§ 151–169 (1988 & Supp. V).

671. *Golden State*, 493 U.S. at 112–13.

672. The Court also held that the Supremacy Clause itself is not a source of rights enforceable under § 1983. *Golden State*, 493 U.S. at 107–08. *See infra* Chapter 5.

673. 479 U.S. 418 (1987).

674. *Id.* at 420 (citations omitted).

675. *Id.*

676. *Id.* at 421.

677. *Id.* at 430.

678. 496 U.S. 498 (1990).

679. *See* 42 U.S.C. §§ 1396–1396v (1998 & Supp. V).

680. *Id.* § 1396a(a)(13).

681. *Wilder*, 496 U.S. at 510.

682. *Id.* at 512.

683. *Id.* at 519.

684. *Id.* In 2006, Congress eliminated the Boren Amendment language so that a state is no longer required by federal statute “to make ‘assurances’ that its reimbursement rates will achieve certain objectives. Rather, a state now must provide ‘a public process for determination of rates of payment’ for nursing facilities, and intermediate care facilities that allows for provider participation. *See* [42 U.S.C.] § 1396a(a)(13)(A) (2006).” *Developmental Servs. Network v. Douglas*, 666 F.3d 540, 546 n.13 (9th Cir. 2011).

685. 503 U.S. 347 (1992).

686. *Id.* at 350. *See* 42 U.S.C. §§ 620–628, 670–679a (1998 & Supp. V).

687. 42 U.S.C. §§ 620–628, 670–679a (1998 & Supp. V).

688. *Id.* § 671(a)(15).

689. *Suter*, 503 U.S. at 357.

690. *Id.*

691. *Id.* at 359.

692. *Id.* at 360.

*Congressional Response to Suter*: Congress responded to *Suter* by passing an amendment to the Social Security Act, which provides that in all pending and future actions

brought to enforce a provision of the [Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such ground applied in *Suter v. Artist M.* [cite omitted], but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* [cite omitted] that section 471(a)(15) [42 U.S.C. § 671(a)(15)] of this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2 (amended Oct. 20, 1994).

The Eleventh Circuit ruled that “Section 1320a-2 does not purport to reject any and all grounds ruled upon in *Suter*; it purports only to overrule certain grounds—i.e., that a provision is unenforceable simply because of its inclusion in a section requiring a state plan or specifying the contents of such a plan.” *Harris v. James*, 127 F.3d 993, 1002–03 (11th Cir. 1997). *Accord* *Planned Parenthood of Ind. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 976 n.9 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736 & 2738 (2013). On the other hand, a federal district court interpreted § 1320a-2 to mean that, while the holding of *Suter* with respect to the “reasonable efforts” provision of the Adoption Act remains good law,

the amendment overrules the general theory in *Suter* that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan. Instead, the previous tests of *Wilder* and *Pennhurst* apply to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries.

*Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995). *See also* *BK & SK v. N.H. Dep’t of Health & Human Servs.*, 814 F. Supp. 2d 59, 68–70 (D.N.H. 2011) (discussing

different judicial interpretations of § 1320a-2 and adopting view that it means only that mere fact federal statute refers to requirements of “state plan” does not render federal statute unenforceable under § 1983).

693. 520 U.S. 329 (1997).

694. Title IV-D of the Social Security Act, as added, 88 Stat. 2351 and as amended, 42 U.S.C.A. §§ 651–669b (Supp. 1997).

695. *Blessing*, 520 U.S. at 342–43. *See also* L.J. v. Wilbon, 633 F.3d 297, 309 (4th Cir. 2011) (“Whether a plaintiff has a right to bring an action under a particular provision of [the Adoption Assistance and Child Welfare Act] requires a section-specific inquiry.”) (citing *Blessing*, 520 U.S. at 342).

696. *Blessing*, 520 U.S. at 342.

697. 536 U.S. 273 (2002).

698. 20 U.S.C. § 1232g(b)(1) (1994).

699. *Gonzaga Univ.*, 536 U.S. at 278, 283.

700. *Id.* at 290.

701. *Id.*

702. *Blessing*, 520 U.S. at 341. *Accord* *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005).

703. *See* *Smith v. Robinson*, 468 U.S. 992 (1984). *See also* *City of Rancho Palos Verdes*, 544 U.S. at 120.

704. *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981).

705. 453 U.S. 1 (1981).

706. *See* 33 U.S.C. §§ 1251–1387 (1988 & Supp. V).

707. *See id.* §§ 1401–1445.

708. *See Middlesex Cnty. Sewerage Auth.*, 453 U.S. at 12.

709. *Id.*

710. *Id.* at 13.

711. *Id.* at 20.

712. 468 U.S. 992 (1984).

713. *Id.* at 1009.

714. *See* 20 U.S.C. §§ 1400–1485 (1988 & Supp. V). In 1991, the Act was renamed Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1491 (1994).

715. *Smith*, 468 U.S. at 1009.

716. *Id.* at 1024 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting).

717. *See* 20 U.S.C. § 1415(f) (1988 & Supp. V). *See also* Chapter 5, *infra*.

718. 544 U.S. 113 (2005).

719. *Id.* at 114.

720. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992).

721. 536 U.S. 273 (2002).

722. *Id.* at 290.

723. *Id.* at 281.

724. 451 U.S. 1 (1981).

725. See *id.* at 280–81, referring to *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987).

726. *Planned Parenthood of Ind. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 977 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736 & 2738 (2013).

727. See 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 4.04[A] (4th ed. 2014).

728. *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002). See also *Shakhnes v. Berlin*, 689 F.3d 244, 250–51 (2d Cir. 2012); *Taylor v. Hous. Auth. of New Haven*, 645 F.3d 152, 153–54 (2d Cir. 2011); *Guzman v. Shewry*, 552 F.3d 941, 952–53 (9th Cir. 2009); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003); *Houston v. Williams*, 547 F.3d 1357, 1362–63 (11th Cir. 2008); *Johnson v. City of Detroit*, 446 F.3d 614, 628–29 (6th Cir. 2006); *Harris v. James*, 127 F.3d 993, 1008–09 (11th Cir. 1997).

729. *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh*, 382 F.3d 412, 424 (3d Cir. 2004).

730. 532 U.S. 275 (2001).

731. *Id.* at 291.

732. 479 U.S. 418 (1987).

## Chapter 7: Color of State Law and State Action, p. 81

733. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978). See *supra* Chapter 3, § I.

734. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (§ 1983 is not implicated by “merely private conduct, no matter how discriminatory or wrongful”); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974).

735. See *District of Columbia v. Carter*, 409 U.S. 418, 424–25 (1973) (“actions of the Federal Government and its officers are at least facially exempt from [§ 1983’s] proscriptions”); *McCloskey v. Mueller*, 446 F.3d 262, 271 (1st Cir. 2006) (“a section 1983 claim ordinarily will not lie against a federal actor”). In limited circumstances, a claim for damages against a federal official may be based on the *Bivens* doctrine. See *supra* Chapter 2.

736. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996).

737. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). However, color of state law would not constitute state action if color of state law were interpreted to mean merely acting “with the knowledge of and pursuant to [a] statute.” *Id.* at 935 n.18 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970)).

738. *West v. Atkins*, 487 U.S. 42, 49–50 (1988); *Lugar*, 457 U.S. at 935.

739. See, e.g., *Hotel & Rest. Employees Union, Local 100 v. City of N.Y. Dep’t of Parks & Recreation*, 311 F.3d 534, 544 (2d Cir. 2002) (because court found no constitutional violation, it assumed, without deciding, private party engaged in state action); *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 248 (D. Conn. 2012).

740. See, e.g., *Walter v. Horseshoe Entm’t*, 483 F. App’x 884, 886 (5th Cir. 2012) (because plaintiffs’ claims were barred by doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), court didn’t have to reach state action issue).

741. 454 U.S. 312 (1981).

742. *See* *West v. Atkins*, 487 U.S. 42, 50 (1988) (discussing *Polk Cnty.*).

743. *See* *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 612 (6th Cir. 2007), *cert. denied*, 555 U.S. 813 (2008). *See also* *Vermont v. Brillon*, 556 U.S. 81, 91 & n.7 (2009) (discussing *Polk County*). Further, a public defender may be sued under § 1983 if she conspired with a state actor, even if the state actor is immune from § 1983 liability. *Tower v. Glover*, 467 U.S. 914, 919–20 (1984).

744. 487 U.S. 42 (1988).

745. *See* *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55–58 (1999) (discussing *West*).

746. *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 325–26 (1946)).

747. *Compare, e.g.,* *Wragg v. Vill. of Thornton*, 604 F.3d 464, 467 (7th Cir. 2010) (village fire chief who sexually molested sixteen-year-old participant in fire cadet program “was a governmental actor, not a private actor, as he indisputably committed the abusive acts against Wragg in the line of his duty as fire chief”), *with* *Roe v. City of Waterbury*, 542 F.3d 31, 38 (7th Cir. 2008) (mayor’s sexual abuse of young children not conduct of official policy maker; “Decisions to sexually abuse young children are not ‘made for practical or legal reasons’ and are not in any way related to the City’s interests.”), *cert. denied*, 130 S. Ct. 95 (2009)).

748. *See, e.g.,* *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995); *Pitchell v. Callahan*, 13 F.3d 545, 548 (2d Cir. 1994); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991), *cert. denied*, 504 U.S. 917 (1992); *Bonsignore v. City of N.Y.*, 683 F.2d 635, 638–39 (2d Cir. 1982); *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980); *Stengel v. Belcher*, 522 F.2d 438, 440–41 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976).

749. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (citations, quotation marks, and brackets omitted).

750. *See* *Georgia v. McCollum*, 505 U.S. 42 (1992) (criminal defense attorney’s exercise of race-based preemptory challenge); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private civil litigants’ exercise of race-based preemptory challenge); *West v. Atkins*, 487 U.S. 42 (1988) (private physician’s provision of medical care to inmates). *See also* *Brentwood Acad.*, 531 U.S. 288 (2001).

751. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmonson*, 500 U.S. at 632 (O’Connor, J., dissenting)).

752. 365 U.S. 715 (1961).

753. *See* *Moose Lodge v. Iris*, 407 U.S. 163, 175 (1972) (describing *Burton*).

754. *Rendell-Baker v. Kohn*, 457 U.S. 830, 831 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982).

755. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999). *See also* *Crissman v. Dover Downs*, 289 F.3d 231, 242 (3d Cir.), *cert. denied*, 537 U.S. 886 (2002) (*Burton* “was crafted for the unique set of facts presented”).

756. *Flagg Bros. v. Brooks*, 436 U.S. 149, 157–58 (1978); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

757. *Terry v. Adams*, 345 U.S. 461, 469 (1953).

758. *See* discussion in *Jackson*, 419 U.S. at 353.

759. 487 U.S. 42 (1988).

760. *See Am. Mfrs.*, 526 U.S. at 55–58 (discussing *West*). *See also* *Fabrikant v. French*, 691 F.3d 193 (2d Cir. 2012) (relying partly on *West*, holding county SPCA’s sterilization of pets was state action under “public function test” although entitled to qualified immunity because due process rights asserted weren’t clearly established).

761. *Am. Mfrs.*, 526 U.S. at 55.

762. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

763. *Blum v. Yaretsky*, 457 U.S. 991, 993 (1982).

764. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987). *See also* *NCAA v. Tarkanian*, 488 U.S. 179, 197 n.18 (1988).

765. *Flagg Bros. v. Brooks*, 436 U.S. 149, 159–60 (1978).

766. *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976).

767. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–53 (1974).

768. *Blum*, 457 U.S. at 1004.

769. *Flagg Bros.*, 436 U.S. at 164; *Jackson*, 419 U.S. at 354.

770. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

771. *See, e.g., Dietrich v. John Ascuaga’s Nugget*, 548 F.3d 892 (9th Cir. 2008) (mere fact private business employees summoned police did not render private employees state actors); *Ginsberg v. Healey Car & Truck Leasing*, 189 F.3d 268, 271–72 (2d Cir. 1999).

772. *NCAA v. Tarkanian*, 488 U.S. 179, 193–94 (1988). *See also* *Gibson v. Regions Fin. Corp.*, 557 F.3d 842, 846 (8th Cir. 2009) (“... the mere furnishing of information to a law enforcement officer, even if the information is false, does not constitute joint activity with state officials”).

773. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982); *Blum*, 457 U.S. at 1008; *Jackson*, 419 U.S. at 350.

774. *Rendell-Baker*, 457 U.S. at 840 (no state action even though educational institution received almost all of its funding from state). *See also* *Jackson*, 419 U.S. at 351–52 (state grant of monopoly power).

775. *See Rendell-Baker*, 457 U.S. at 840–41 (school); *Blum*, 457 U.S. at 1008 (nursing home); *Jackson*, 419 U.S. at 350–54 (utility company).

776. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

777. 449 U.S. 24 (1980).

778. A court’s issuance of a judgment is clearly state action. *Shelley v. Kraemer*, 334 U.S. 1, 14–20 (1948). However, “merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.” *Sparks*, 449 U.S. at 28.

779. 488 U.S. 179 (1988).

780. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–66 (1978).

781. *Lugar*, 457 U.S. at 939–42.

782. 457 U.S. 922 (1982).

783. *Id.* at 937. The Court in *Lugar* explained that in this context the alleged “deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible.” *Id.* A private party who misused or abused the state process does not

engage in state action. *Id.* at 941. In a footnote, the Court stated that its analysis was limited to prejudgment seizures of property. *Id.* at 939 n.21. The lower federal courts have generally been reluctant “to extend the relatively low bar of *Lugar*’s so-called ‘joint action’ test outside the context of challenged prejudgment attachment or garnishment proceedings.” *Revis v. Meldrum*, 489 F.3d 273, 289 (6th Cir. 2007).

*Repossession Cases:* The joint action issue arises in cases involving a private party’s repossession of property in which a law enforcement officer plays some role. *See, e.g., Hensley v. Gassman*, 693 F.3d 681, 688–92 (6th Cir. 2012); *Cochran v. Gilliam*, 656 F.3d 300, 308 (6th Cir. 2011). The Eighth Circuit stated that “there is no state action if the officer merely keeps the peace, but there is state action if the officer affirmatively intervenes to aid the reposessor enough that the repossession would not have occurred without the officer’s help.” *Moore v. Carpenter*, 404 F.3d 1043, 1046 (8th Cir. 2005). For an insightful analysis of the issue, see *Barrett v. Harwood*, 189 F.3d 297, 302 (2d Cir. 1999) (case law doesn’t provide “bright line” but “spectrum” of police involvement in repossession), *cert. denied*, 530 U.S. 1262 (2000).

*Shoplifting Cases:* In shoplifting cases, the prevailing view is the store’s detention of a suspected shoplifter is state action only if the store and police have a “prearranged plan” pursuant to which the police agree to arrest anyone identified by the store as a shoplifter. *See, e.g., Boykin v. Van Buren Twp.*, 479 F.3d 444, 452 (6th Cir. 2007). *See also* authorities cited in 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 5.16[A] (4th ed. 2014). 784. 531 U.S. 288 (2001).

785. *See Brentwood Academy*, 531 U.S. at 314 (Thomas, J., dissenting) (“majority never defines ‘entwinement’ . . .”).

786. *See, e.g., Chudacoff v. Univ. Med. Ctr.*, 649 F.3d 1143 (9th Cir. 2011); *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169 (6th Cir. 2008). For other decisions, *see* Schwartz, *supra* note 783, § 5.17[B].

## Chapter 8: Section 1983 Defendants, p. 87

787. 491 U.S. 58 (1989).

788. *Id.* at 71 n.10.

789. 502 U.S. 21 (1991).

790. *Will*, 491 U.S. at 66–68. *See also infra* Chapter 14.

791. *Id.* at 67 (footnote omitted).

792. *Id.* at 71 n.10. *See infra* Chapter 14.

793. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997). *Cf. Settles v. U.S. Parole Comm’n*, 429 F.3d 1098, 1104 (D.C. Cir. 2005) (“by failing to raise . . . in the district court . . . that it is not a ‘person’ under § 1983, the Commission” waived issue).

794. 529 U.S. 765 (2000).

795. *Id.* at 779.

796. *Id.*

797. *Id.*

798. 226 F.3d 815 (7th Cir. 2000).

799. *Id.* at 818 (citations omitted).

800. *See, e.g., Fontana v. Alpine Cnty.*, 750 F. Supp. 2d 1148, 1151 (E.D. Cal. 2010). (“States and state officials acting in their official capacities are immune from § 1983 liability because they are not considered ‘persons’ under the statute.”) (citing *Will*, 491 U.S. at 71).



801. See, e.g., *Harrison v. Michigan*, 722 F.3d 768, 771 (6th Cir. 2013); *GeorgiaCarry. Org, Inc. v. Georgia*, 687 F.3d 1244, 1254 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 856 (2013); *Colon-Rivera v. Asociacion de Suscripcion*, 451 F. App'x 5, 8 (1st Cir. 2011); *McMillan v. N.Y. State Bd. of Elections*, 449 F. App'x 79, 80 (2d Cir. 2011); *Grover-Tsimi v. Minnesota*, 449 F. App'x 529, 530 (8th Cir. 2011); *Atkin v. Johnson*, 432 F. App'x 47, 48 (3d Cir. 2011); *Thomas v. Tex. Dep't of Family & Protective Servs.*, 427 F. App'x 309, 312–13 (5th Cir. 2011); *Brait Builders Corp. v. Commonwealth of Mass., Div. of Capital Asset Mgmt.*, 644 F.3d 5, 10–12 (1st Cir. 2011); *Baker v. James T. Vaughn Corr. Ctr.*, 425 F. App'x 83, 84 (3d Cir. 2011); *Keisling v. Renn*, 425 F. App'x 106, 109 (3d Cir. 2011); *Donnelly v. TRL, Inc.*, 420 F. App'x 126, 129 (3d Cir. 2010); *Talbert v. Judiciary of N.J.*, 420 F. App'x 140, 141 (3d Cir. 2011); *Fournierat v. Wis. Law Review*, 420 F. App'x 816, 830 (10th Cir. 2011); *Harris v. McSwain*, 417 F. App'x 594, 595 (8th Cir. 2011); *Ross v. Tex. Educ. Agency*, 409 F. App'x 765, 768–69 (5th Cir. 2011); *281 Care Comm. v. Arneson*, 638 F.3d 621, 631–33 (8th Cir. 2011); *Nails v. Penn. Dep't of Transp.*, 414 F. App'x 452, 455 (3d Cir. 2011); *Lee Testing & Eng'g Inc. v. Ohio Dep't of Transp.*, 855 F. Supp. 2d 722, 725–27 (S.D. Ohio 2012); *Canman v. Bonilla*, 778 F. Supp. 2d 179, 184 (D.P.R. 2011); *Replay, Inc. v. Sec'y of Treasury of P.R.*, 778 F. Supp. 2d 207, 213–14 (D.P.R. 2011); *Smiley v. Ala. Dep't of Transp.*, 778 F. Supp. 2d 1283, 1298 (M.D. Ala. 2011); *Draper v. Darby Twp. Police Dep't*, 777 F. Supp. 2d 850, 853–54 (E.D. Pa. 2011); *Holland v. Bramble*, 775 F. Supp. 2d 748, 750 (D. Del. 2011); *Fennell v. Rodgers*, 762 F. Supp. 2d 727, 731–32 (D. Del. 2011); *Fishman v. Daines*, 743 F. Supp. 2d 127, 136–39 (E.D.N.Y. 2010); *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 381–82 (S.D.N.Y. 2000); *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1350 (S.D. Fla. 1999).

802. 436 U.S. 658 (1978).

803. *Id.* at 690.

*District of Columbia*: “The District of Columbia is a municipality for the purpose of § 1983.” *People for Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 425 (D.C. Cir. 2005).

804. 491 U.S. 58 (1989).

805. *Id.* at 67 n.7. See *infra* Chapter 10.

806. See, e.g., *Anemone v. Metro. Transp. Auth.*, 410 F. Supp. 2d 255, 264 n.2 (S.D.N.Y. 2006); *Wilhelm v. City of Calumet City*, 409 F. Supp. 2d 991, 994 n.1 (N.D. Ill. 2006); *Robinson v. District of Columbia*, 403 F. Supp. 2d 39, 49 (D.D.C. 2005).

807. See *infra* Chapter 14.

808. 520 U.S. 781 (1997).

809. *Id.* at 786.

810. *Id.* at 795.

811. *Id.* at 785–86.

812. *Id.* See, e.g., *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013) (California district attorney acts as local policy maker in establishing administrative policies), *cert. denied*, 134 S. Ct. 906 (2014).

813. See, e.g., *Best v. City of Portland*, 554 F.3d 698 n.\* (7th Cir. 2009) (police department not suable entity under § 1983); *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992) (“[S]heriffs departments and police departments are not usually considered legal entities subject to suit.”).

## Chapter 9: Causation, p. 91

814. *Martinez v. California*, 444 U.S. 277, 284–85 (1980).

815. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 50 (1st Cir. 2009); *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 864 (7th Cir. 2010); *Murray v. Earle*, 405 F.3d 278, 290 (5th Cir. 2005); *McKinley v. City of Mansfield*, 404 F.3d 418, 438 (6th Cir. 2005). *See also* *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012). On § 1983 claims, the court stated, “Causation is a standard element of tort liability, and includes two requirements: (1) the act must be the ‘cause-in-fact’ of the injury, *i.e.*, ‘the injury would not have occurred absent the conduct’; and (2) the act must be the ‘proximate cause,’ ... *i.e.*, ‘the injury is of a type that a reasonable person would see as a likely result of his or her conduct.’” *Id.* at 582 (citation omitted). *See also* *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 98 (2013).

816. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). *Accord* *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986).

817. *Warner v. Orange Cnty. Dep’t of Prob.*, 115 F.3d 1068, 1071 (2d Cir. 1996) (quoting *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989)). “Where multiple ‘forces are actively operating,’ ... plaintiffs may demonstrate that each defendant is a concurrent cause by showing that his or her conduct was a ‘substantial factor in bringing [the injury] about.’ In a case of concurrent causation, the burden of proof shifts to the defendants in that ‘a tortfeasor who cannot prove the extent to which the harm resulted from other concurrent causes is liable for the whole harm’ because multiple tortfeasors are jointly and severally liable.” *Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006) (quoting *Northington v. Marin*, 102 F.3d 1564, 1568–69 (10th Cir. 1996)).

818. *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012).

819. *See, e.g., Martinez*, 444 U.S. at 284–85; *Wray v. City of N.Y.*, 490 F.3d 189, 193 (2d Cir. 2007); *Murray*, 405 F.3d at 291; *Townes v. City of N.Y.*, 176 F.3d 138, 146–47 (2d Cir.), *cert. denied*, 528 U.S. 964 (1999). *See also* *Chalmers*, 703 F.3d at 647.

820. *Zahrey v. Coffey*, 221 F.3d 342, 351 (2d Cir. 2000).

821. *See, e.g., Young v. City of Providence*, 404 F.3d 4, 23 (1st Cir. 2005) (questions of causation “are generally best left to the jury”) (citing *Wortley v. Camplin*, 333 F.3d 284, 295 (1st Cir. 2003)); *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004). *See also* *Schneider v. City of Grand Junction Police Dep’t*, 717 F.3d 760, 778–79 (10th Cir. 2013) (although causation generally question of fact for jury, whether plaintiff presented sufficient evidence of causation to defeat summary judgment is legal question).

822. 131 S. Ct. 447 (2010).

823. *Id.* at 452.

824. *Id.* On the issues of municipal liability and causation, *see infra* Chapter 11, § I.D.

825. 131 S. Ct. 1186 (2011).

826. *Id.* at 1194. The Court adopted the so-called “cat’s paw” theory, named after the fable in which “a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.” *Id.* at 1190 n.1.

827. *Id.* at 1191, 1193.

828. *Id.* at 1192.

829. *Id.* at 1192–93.

830. *Id.* at 1193. The decision in *Staub* was limited to discriminatory acts by supervisors, leaving open “whether the employer would be liable if a co-worker, rather than a supervisor, committed an employment decision.” *Id.* at 1194. The Supreme Court remanded to the Seventh Circuit to determine whether variance between the jury instructions and the Court’s decision necessitated a new trial, or was harmless error. *Id.*

831. *See* *Smith v. Bray*, 681 F.3d 888, 898–99 (7th Cir. 2012) (dicta) (proctor’s cat’s paw theory applies in § 1983 actions).

832. 707 F.3d 28 (1st Cir. 2013).

833. 373 U.S. 83 (1963).

834. *Drumgold*, 707 F.3d at 54 (citation omitted).

835. *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 402–04 (1997); *City of Canton v. Harris*, 489 U.S. 378, 385–86 (1989).

836. *Bd. of Cnty. Comm’rs*, 520 U.S. at 402–04; *City of Canton*, 489 U.S. at 385–86.

837. The Court has stressed that for municipal liability claims based on inadequate training or deficient hiring, the fault and causation standards are stringent. *See infra* Chapter 11. Some courts, however, have equated phrases like “moving force” with proximate cause. *See infra* note 872.

## Chapter 10: Capacity of Claim: Individual Versus Official Capacity, p. 94

838. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978); *Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm’rs*, 405 F.3d 1298, 1302 n.3 (11th Cir. 2005).

839. 473 U.S. 159 (1985).

840. *Id.* at 165–66 (quoting *Monell*, 436 U.S. at 690 n.55 (1978)). *See, e.g.*, *Nivens v. Gilchrist*, 444 F.3d 237, 249 (4th Cir. 2006) (claim against North Carolina district attorney in official capacity considered claim against state for purpose of Eleventh Amendment).

841. *See, e.g.*, *Cotton v. District of Columbia*, 421 F. Supp. 2d 83, 86 (D.D.C. 2006); *Baines v. Masiello*, 288 F. Supp. 2d 376, 384 (W.D.N.Y. 2003); *McCachren v. Blacklick Valley Sch. Dist.*, 217 F. Supp. 2d 594, 599 (W.D. Pa. 2002).

842. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

843. The fact that a governmental entity agreed to indemnify an official for monetary liability in her official capacity does not convert the personal-capacity claim into an official-capacity claim. *See infra* Chapter 15.

844. 502 U.S. 21 (1991).

845. *Id.* (quoting *Kentucky v. Graham*, 473 U.S. 159 (1985)).

846. *See infra* Chapters 15 (absolute immunities) and 16 (qualified immunity).

847. *Askew v. Sheriff of Cooks Cnty.*, 568 F.3d 632, 637 (7th Cir. 2009) (“For the present, the County does not become an ‘indispensable’ party just because it may need to indemnify the Sheriff in the future, any more than an insurance company must be included as a defendant in a suit against its insured.”).

848. *See, e.g.*, *Moore v. City of Harriman*, 272 F.3d 769, 772–73 (6th Cir. 2001); *Biggs v. Meadows*, 66 F.3d 56, 59–60 (4th Cir. 1995). *Cf. Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989).

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849. 436 U.S. 658 (1978).

850. State law cannot authorize respondeat superior under § 1983. *Coon v. Town of Springfield*, 404 F.3d 683, 687 (2d Cir. 2005) (“Just as states cannot extinguish municipal liability under § 1983 via state law, they cannot enlarge it either.”).

*Private-Party State Actors*: The rule against respondeat superior extends to private-party state actors. *See, e.g., Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012); *Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012); *Craig v. Floyd Cnty.*, 643 F.3d 1306, 1310 (11th Cir. 2011); *Rojas v. Alexander’s Dep’t Store, Inc.*, 924 F.2d 406, 408–09 (2d Cir. 1990); *Mejia v. City of N.Y.*, 228 F. Supp. 2d 234, 243 (E.D.N.Y. 2002).

851. A suit against a municipal official in her official capacity is considered a suit against the municipality itself. *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985). *Accord* *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). *See supra* Chapter 10.

852. *Monell*, 436 U.S. at 694. The municipal “policy or practice” requisite is often very difficult to satisfy. *See, e.g., Wimberly v. City of Clovis*, 375 F. Supp. 2d 1120, 1127 (D.N.M. 2004).

*Waiver of Monell*: The majority view in the circuits is that a municipality can waive *Monell*’s “policy and practice” requirements. *Kinnison v. City of San Antonio*, 480 Fed. App’x 271, 275–76 (5th Cir. 2012) (citing *Ford v. Cnty. of Grand Traverse*, 535 F.3d 483, 491–99 (6th Cir. 2008); *Kelly v. City of Oakland*, 198 F.3d 779, 785 (9th Cir. 1999); *Morro v. City of Birmingham*, 117 F.3d 508, 514–16 (11th Cir. 1997)). *Kinnison* cited a Seventh Circuit case reaching the opposite result, reasoning that *Monell* doesn’t create a defense but is an element of plaintiff’s claim. *Smith v. Chi. Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999). *Kinnison* also cited more recent Seventh Circuit decisions allowing municipalities to waive certain aspects of *Monell*. *See, e.g., Evans v. City of Chi.*, 513 F.3d 735, 741 (7th Cir. 2008); *Lopez v. City of Chi.*, 464 F.3d 711, 717 n.1 (7th Cir. 2006).

853. 131 S. Ct. 447 (2010).

854. *Id.* at 452.

855. *Id.* (quoting *Monell*, 436 U.S. at 690).

856. *Humphries*, 131 S. Ct. at 453. The plaintiffs in *Humphries* argued that *Monell* was based on the concern that municipalities not be required to pay large damage awards based on respondeat superior. The Court, however, found that *Monell*’s “rejection of *respondeat superior* liability primarily rested not on the municipality’s economic needs, but on the fact that liability in such a case does not arise out of the municipality’s own wrongful conduct.” *Id.* The plaintiffs also argued that *Monell* is “redundant” when prospective relief is sought because “a court cannot grant prospective relief against a municipality unless the municipality’s own conduct caused the violation.” *Id.* Even assuming that this is accurate, it provided no basis for lifting the *Monell* “policy or practice” requisite. “To argue that a requirement is necessarily satisfied . . . is not to argue that its satisfaction is unnecessary.” *Id.* Finally, the plaintiffs made “the mirror-image argument that applying *Monell* to prospective relief claims will leave some set of ongoing constitutional violations beyond redress.” *Id.* However, despite the fact that four circuits had applied *Monell*’s “policy or practice” requirement to claims for prospective relief, the plaintiffs failed to present “any actual or hypothetical example that provides serious cause for concern.” *Id.*

857. 445 U.S. 622 (1980).

858. *Id.* at 638.

859. 507 U.S. 163 (1993).

860. *Id.* at 166. *See also* *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466–67 (5th Cir. 1999) (absolute prosecutorial immunity not available in official capacity suit); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72 (2d Cir. 1992) (municipality may not assert legislative immunity). Further, state law immunities may not be asserted by municipalities sued under § 1983. *Howlett v. Rose*, 496 U.S. 356, 375–76 (1990) (state court § 1983 action). *See also* *Davis v. United States*, 131 S. Ct. 2419, 2433 n.9 (2011) (dictum); *Alden v. Maine*, 527 U.S. 706, 740 (1994) (reaffirming *Howlett*).

861. *Monell*, 436 U.S. at 690.

862. 453 U.S. 247 (1981).

863. *See infra* Chapter 21.

864. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)).

865. *Praprotnik*, 485 U.S. at 123. *See also* *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–83 (1986).

866. *See* *City of Canton v. Harris*, 489 U.S. 378, 380 (1989). *See also* *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (rejecting inadequate training claim because plaintiff failed to demonstrate pattern of constitutional violations).

867. *See, e.g., Vann v. City of N.Y.*, 72 F.3d 1040, 1049–51 (2d Cir. 1995); *Bordanaro v. McLeod*, 871 F.2d 1151, 1158–63 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989). *See also* 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 7.18 (4th ed. 2014).

868. *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 410–11 (1997).

869. *See, e.g., Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) (“[T]he decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for purposes of § 1983 municipal liability.”).

870. *Bd. of Cnty. Comm’rs*, 520 U.S. at 400; *City of Canton*, 489 U.S. at 388–89.

871. *See, e.g., City of Canton*, 489 U.S. at 385 (there must be “a direct causal link between a municipal policy or custom and the alleged constitutional deprivation”).

872. The Second Circuit equated these various concepts with proximate cause. *See* *Cash v. Cnty. of Erie*, 654 F.3d 324, 340 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012) (citing cases).

873. 503 U.S. 115 (1992).

874. *Id.* at 120.

875. *See also* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 252 (1981) (vote of city council to cancel license for rock concert was official decision for *Monell* purposes); *Owen v. City of Independence*, 445 U.S. 622, 633 (1980) (personnel decision made by city council constitutes official city policy). *Fact Concerts* and *Owen* demonstrate that decisions officially adopted by the government body itself need not have general or recurring application to constitute official “policy.”

876. *See, e.g., Snyder v. King*, 745 F.3d 242 (7th Cir. 2014); *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991). *But see* *McKusick v. City of Melbourne*, 96 F.3d 478, 484 (11th Cir. 1996) (holding that development and implementation of ad-

ministrative enforcement procedure, going beyond terms of state court injunction, leading to arrest of all anti-abortion protesters found within buffer zone, including persons not named in injunction, amounted to cognizable policy choice); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (rejecting defendants' argument that they had no choice but to follow state "fleeing felon" policy, and holding their "decision to authorize use of deadly force to apprehend nondangerous fleeing burglary suspects was . . . a deliberate choice from among various alternatives"), *cert. denied*, 510 U.S. 1177 (1994). *See also* *Vives v. City of N.Y.*, 524 F.3d 346 (2d Cir. 2008) (carefully analyzing the issue).

877. 403 F.3d 1208 (11th Cir. 2005).

878. *Id.* at 1222.

879. *Am. Fed'n of Labor v. City of Miami*, 637 F.3d 1178, 1187–88 (11th Cir. 2011).

880. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). *See also* *Atkinson v. City of Mt. View*, 709 F.3d 1201, 1215 (8th Cir. 2013).

881. *See* *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Praprotnik*, 485 U.S. at 123.

882. *Pembaur*, 475 U.S. at 481–82 ("The fact that a particular official—even a policy-making official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of the discretion."). *See* *Killinger v. Johnson*, 389 F.3d 765, 771 (7th Cir. 2004) ("mere authority to implement pre-existing rules is not authority to set policy").

883. *See, e.g., Williams v. Butler*, 863 F.2d 1398, 1402 (8th Cir. 1988) (en banc) ("a very fine line exists between delegating final policymaking authority to an official . . . and entrusting discretionary authority to that official"). *See also* *Mulholland v. Gov't Cnty. of Berks*, 706 F.3d 227, 244 (3d Cir. 2013) (agency's litigation strategy not a policy or custom); *Teesdale v. City of Chi.*, 690 F.3d 829, 836–37 (7th Cir. 2012) (city attorneys aren't municipal policy makers, and their arguments don't represent city policy); *Vodak v. City of Chi.*, 639 F.3d 738, 748–49 (7th Cir. 2011) (Posner, J.) (when police superintendent is policy maker for control of demonstrations, it's "helpful" to determine whether (1) official is constrained by policies of other officials or legislative bodies; (2) decision is subject to meaningful review; and (3) decision is within official's delegated authority) (following *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 676 (7th Cir. 2009)).

884. 475 U.S. 469 (1986).

885. Justice White wrote separately to make clear his position (concurring in by Justice O'Connor) that a policy-making official's decision could not result in municipal liability if the decision were contrary to controlling federal, state, or local law. *Pembaur*, 475 U.S. at 485–87 (White, J., concurring).

886. *Id.* at 472, 473.

887. *Id.* at 480 (citing *Owen v. City of Independence*, 445 U.S. 622 (1980) ("City Council passed resolution firing plaintiff without a pretermination hearing"), and *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) ("City Council cancelled license permitting concert because of dispute over content of performance")).

888. *Pembaur*, 475 U.S. at 480 (citing *Monell*, 436 U.S. at 694).

889. *Id.* at 481.

890. *Id.* (Part II-B of Court's opinion: Brennan, J., joined by White, Marshall & Blackmun, JJ.).

891. *Id.* at 483. Whether a municipal entity delegated final policy-making authority to a particular official may present an issue of fact. *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir.), *cert. denied*, 502 U.S. 1005 (1991). *See also* *Kujawski v. Bd. of Comm'rs*, 183 F.3d 734, 739 (7th Cir. 1999) ("[T]here remains a genuine issue of fact as to whether the Board had, as a matter of custom, delegated final policymaking authority to [the chief probation officer] with respect to [personnel decisions of] community corrections employees."). *But see* *Gros v. City of Grand Prairie*, 181 F.3d 613, 617 (5th Cir. 1999) ("[T]he district court should have determined whether any such delegation had occurred as a matter of state law.").

892. 485 U.S. 112 (1988).

893. *Id.* at 114. The Court in *Praprotnik* reversed a decision by the Eighth Circuit Court of Appeals, which had found the city liable for the transfer and layoff of a city architect in violation of his First Amendment rights. The Eighth Circuit attributed to the city adverse personnel decisions made by the plaintiff's supervisors where such decisions were considered "final" because they were not subject to *de novo* review by higher-ranking officials. *City of St. Louis v. Praprotnik*, 798 F.2d 1168, 1173–75 (8th Cir. 1986).

894. *Praprotnik*, 485 U.S. at 124.

895. *Id.* In *Praprotnik*, the relevant law was found in the St. Louis City charter, which gave policy-making authority in matters of personnel to the mayor, alderman, and Civil Service Commission. *Id.* at 126. *See also* *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 737 (1989) (discussed in text below); *Dotson v. Chester*, 937 F.2d 920, 928 (4th Cir. 1991) (court examines state law and county code to find sheriff final policy maker as to operation of county jail).

896. *See* *Killinger v. Johnson*, 389 F.3d 765, 771 (7th Cir. 2004) ("mere authority to implement pre-existing rules is not authority to set policy"); *Quinn v. Monroe Cnty.*, 330 F.3d 1320, 1326 (11th Cir. 2003) (municipal "decisionmaker" is one "who had the power to make official decisions and thus may be held *individually* liable," while municipal "policy maker" is one "who takes actions that may cause [the governmental entity] to be held liable for a custom or policy"). *Accord* *Kamensky v. Dean*, 148 F. App'x 878, 879–80 (11th Cir. 2005).

897. *Praprotnik*, 485 U.S. at 127. *See, e.g.,* *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992) ("Liability for unauthorized acts is personal; to hold the municipality liable ... the agent's action must implement rather than frustrate the government's policy.").

898. *Praprotnik*, 485 U.S. at 128–30. *See, e.g.,* *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992) (concluding mere inaction on part of policy maker "does not amount to 'ratification' under *Pembaur* and *Praprotnik*"). In *Christie v. Iopa*, 176 F.3d 1231 (9th Cir.), *cert. denied*, 528 U.S. 928 (1999), the court recognized that ratification is ordinarily a question for the jury, and that ratification requires showing approval by a policy maker, not a mere refusal to overrule a subordinate's action.

899. 491 U.S. 701 (1989).

900. *Id.* at 737.

901. *Praprotnik*, 485 U.S. at 130–31 (plurality opinion), 145 n.7 (Brennan, J., concurring).



902. *Worsham v. City of Pasadena*, 881 F.2d 1336, 1344 (5th Cir. 1989) (Goldberg, J., concurring in part and dissenting in part).

903. 888 F.2d 783 (11th Cir. 1989).

904. *Id.* at 793. *See also* *Gros v. City of Grand Prairie*, 181 F.3d 613, 616 (5th Cir. 1999) (district court should have considered state and local law “as well as evidence of the City’s customs and usages in determining which City officials or bodies had final policy-making authority over the policies at issue in this case”).

905. 883 F.2d 842 (10th Cir. 1989).

906. *Id.* at 868.

907. *Id.* at 868 n.34.

908. *See also* *Argyropoulos v. City of Alton*, 539 F.3d 724, 740 (7th Cir. 2008) (plaintiff “needed to establish, by reference to applicable state or local law, that [Police Commissioner] Sullivan was the final policy maker with respect to police department employment decisions; she failed to provide evidence to this effect, and it is not the court’s task to do so on her behalf”) (citation omitted).

909. Fed. R. Evid. art. X (“Original Document Rule”).

910. Fed. R. Evid. 201(d).

911. 879 F.2d 706 (10th Cir. 1989), *cert. denied*, 502 U.S. 906 (1991).

912. *Id.* at 724 n.25.

913. Fed. R. Evid. 201(b). *See also* discussion of judicial notice in *Getty Petroleum Marketing v. Capital Terminal Co.*, 391 F.3d 312 (1st Cir. 2004).

914. 520 U.S. 781 (1997).

915. *Id.* at 786–87.

916. *See, e.g.*, *D’Ambrosio v. Marino*, 747 F.3d 378, 386 (6th Cir. 2014); *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 906 (2014); *Carter v. Philadelphia*, 181 F.3d 339, 351 (3d Cir.), *cert. denied*, 528 U.S. 1005 (1999); *Walker v. City of N.Y.*, 974 F.2d 293, 301 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993); *Baez v. Hennessy*, 853 F.2d 73, 76–77 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989).

917. *McMillian*, 520 U.S. at 785–86.

918. *Id.* at 785.

919. *Id.* at 786.

920. *Id.* at 791–93.

921. In dissent, Justice Ginsburg wrote:

A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official.... The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some purposes, such as hiring the county’s chief jailor.... And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others.... The Court’s opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policy makers.

*Id.* at 804–05 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).

922. 436 U.S. 658 (1978).

923. *Id.* at 691.



924. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). *See also* *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) (referring to, *inter alia*, “practices so persistent and widespread as to practically have the force of law”) (citing authorities).

925. *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989).

926. *Wilson v. Cook Cnty.*, 742 F.3d 775, 780 (7th Cir. 2014) (citations omitted).

927. 971 F.2d 864 (2d Cir. 1992).

928. *Id.* at 869.

929. *Id.* at 871.

930. Judgment n.o.v. is now referred to as “judgment as a matter of law.” Fed. R. Civ. P. 50.

931. *Sorlucco*, 971 F.2d at 870.

932. *Id.* at 871.

933. *Id.* (“a § 1983 plaintiff may establish a municipality’s liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers”) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988)).

934. *Id.* at 870.

935. *Id.* at 872–73.

936. *Id.* at 872.

937. *See also* *Watson v. Kansas City*, 857 F.2d 690, 695–96 (10th Cir. 1988).

938. *Sorlucco*, 971 F.2d at 872.

939. 291 F.3d 325 (5th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

940. *Id.* at 329–31.

941. *Id.*

942. *Id.* at 331. *See also* *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010) (§ 1983 excessive force case; holding showing of twenty-seven excessive force complaints in four-year period demonstrates city had practice of condoning police use of excessive force in making arrests; but plaintiff failed to show size of Fort Worth Police Department, overall number of arrests made by department during four-year period, or any comparison to other cities; given police department’s large size, twenty-seven incidents of excessive force did not reflect pattern representing official policy of condoning excessive force).

943. 979 F.2d 1342 (9th Cir.), *cert. denied*, 510 U.S. 932 (1992).

944. *Gillette*, 979 F.2d at 1348.

945. *Id.* at 1349.

946. 489 U.S. 378 (1989).

947. *Id.* at 387.

948. *Id.* at 388. Prior to *Canton*, the Court in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), held that a police officer’s use of excessive force, even if “unusually excessive,” did not warrant an inference that it was caused by deliberate indifference or grossly negligent training.

949. The Court observed:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training

may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

*Canton*, 489 U.S. at 390 (footnotes omitted). *See also* *Connick v. Thompson*, 131 S. Ct. 1350, 1360–61 (2011).

950. *City of Canton*, 489 U.S. at 391–92.

951. 511 U.S. 825 (1994).

952. *Id.* at 828–29. *See supra* Chapter 5, § VIII.

953. *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992).

954. *Canton*, 489 U.S. at 390–91.

955. *Id.*

956. *Id.* at 392.

957. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011).

958. *Wereb v. Maui Cnty.*, 830 F. Supp. 2d 1026, 1034 (D. Haw. 2011).

959. *Canton*, 489 U.S. at 391.

960. *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part). For example, all of the justices agreed that there is an obvious need to train police officers as to the constitutional limitations on the use of deadly force (*see Tennessee v. Garner*, 471 U.S. 1 (1985)), and that a failure to so train would be so certain to result in constitutional violations as to reflect the “deliberate indifference” to constitutional rights required for the imposition of municipal liability. *Canton*, 489 U.S. at 390 n.10.

961. *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part). *See also* *Connick v. Thompson*, 131 S. Ct. 1350, 1361 (2011).

962. *See also* *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993) (setting out analysis that clearly illustrates the two different methods of establishing *Canton* deliberate indifference); *Thelma D. v. Bd. of Educ.*, 934 F.2d 929, 934–45 (8th Cir. 1991) (same).

963. *See also* *Allen v. Muskogee*, 119 F.3d 837, 843 (10th Cir. 1997) (finding need for different training obvious where “[c]ity trained its officers to leave cover and approach armed suicidal, emotionally disturbed persons and to try to disarm them, a practice contrary to proper police procedures and tactical principles”); *Zuchel v. City & Cnty. of Denver*, 997 F.2d 730, 741 (10th Cir. 1993) (finding evidence “clearly sufficient to permit the jury reasonably to infer that Denver’s failure to implement . . . recommended [periodic live ‘shoot–don’t shoot’ range training] constituted deliberate indifference to the constitutional rights of Denver citizens”); *Davis v. Mason Cnty.*, 927 F.2d 1473, 1483 (9th Cir. 1991) (“Mason County’s failure to train its officers in the legal limits of the use of force constituted ‘deliberate indifference’ to the safety of its inhabitants”).

964. *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994) (where city requires police officers with police dogs that inflict injury in significant number of cases, failure to adopt policies governing use of dogs, and constitutional limits on use of dogs, constitutes deliberate indifference).

965. 131 S. Ct. 1350 (2011).

966. *Brady v. Maryland*, 373 U.S. 83 (1963).

967. *Connick*, 131 S. Ct. at 1356.

968. *Id.* at 1356 n.1.

969. *Id.* at 1356.
970. *Connick*, 131 S. Ct. at 1360 (quoting *Bryan Cnty.*, 520 U.S. at 420).
971. *Id.* at 1359–60.
972. *Id.* at 1360.
973. *Id.* (emphasis added) (quoting *Bryan Cnty.*, 520 U.S. at 409).
974. *Id.*
975. *Id.* at 1360 n.7.
976. *Id.* (quoting *City of Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part, dissenting in part)).
977. *Id.* at 1361.
978. *Id.* at 1361–62.
979. *Id.* at 1363.
980. *Id.*
981. *Id.* at 1382 (Ginsburg, J., dissenting).
982. See 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 7.17[B], [C] (4th ed. 2014).
983. 520 U.S. 397 (1997).
984. *Id.* at 412.
985. *Id.* at 415–16.
986. *Id.* at 410.
987. *Id.* at 400–02.
988. *Id.* at 405.
989. *Id.* at 405–07 (distinguishing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986) (county prosecutor, acting as final decision maker for county, gave order that resulted in constitutional violation); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 252 (1981) (decision of city council to cancel license permitting concert directly violated constitutional rights); *Owen v. City of Independence*, 445 U.S. 622, 633 n.13 (1980) (city council discharged employee without due process)). In these types of cases, there are no real problems with respect to the issues of fault or causation. See also *Bennett v. Pippin*, 74 F.3d 578, 586 n.5 (5th Cir. 1996) (holding county liable for sheriff's rape of murder suspect, where sheriff was final policy maker in matters of law enforcement).
990. *Brown*, 520 U.S. at 409–11.
991. *Id.* at 412.
992. *Id.* at 410–13.
993. *Id.* at 421 (Souter, J., dissenting).
994. *Id.* at 430–31 (Breyer, J., dissenting). See also *Vodak v. City of Chi.*, 639 F.3d 738, 747 (7th Cir. 2011) (Posner, J.) (citing scholars, and concluding that Supreme Court decisional law rejecting respondeat superior for § 1983 municipal liability is based on “historical misreadings (which are not uncommon when judges play historian)”).
995. 507 U.S. 163 (1993).
996. *Id.* For post-*Leatherman* decisions involving pleading against local government entities, see, e.g., *Atchinson v. District of Columbia*, 73 F.3d 418, 423 (D.C. Cir. 1996) (“A complaint describing a single instance of official misconduct and alleging a failure to train may put a municipality on notice of the nature and basis of a plaintiff’s claim.”); *Jordan v.*

Jackson, 15 F.3d 333, 339 (4th Cir. 1994) (“We believe it is clear . . . that the Supreme Court’s rejection of the Fifth Circuit’s ‘heightened pleading standard’ in *Leatherman* constitutes a rejection of the specific requirement that a plaintiff plead multiple instances of similar constitutional violations to support an allegation of municipal policy or custom.”).

997. However, even after *Leatherman*, some lower federal courts rejected wholly conclusory allegations of municipal policy or practice. *See, e.g.,* Spiller v. Texas City, 130 F.3d 162, 167 (5th Cir. 1997). A federal district court found it unclear whether a “bold” or “naked” allegation of municipal policy or custom is sufficient to satisfy notice pleading. *Luthy v. Proulx*, 464 F. Supp. 2d 69, 75 (D. Mass. 2006).

998. 556 U.S. 662 (2009).

999. 550 U.S. 544 (2007).

1000. Although *Twombly* was an antitrust case, the Court in *Iqbal* found that it was based on an interpretation of Fed. R. Civ. P. 8 and not limited to antitrust cases. *Iqbal* is analyzed in detail *supra* Chapter 1.

1001. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

1002. *Id.*

1003. *Twombly*, 550 U.S. at 570.

1004. In addition, *Twombly* and *Iqbal* did not overrule *Swierkiewicz v. Sorema*, N.A., 534 U.S. 506, 514 (2002). *See* *AE v. Cnty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012).

## Chapter 12: Liability of Supervisors, p. 115

1005. 556 U.S. 662 (2009).

1006. *Id.* at 677. *See also* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978). The liability of a supervisor “must be based on more than the right to control employees. Likewise, simple awareness of employees’ misconduct does not lead to supervisory liability.” *Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003) (citations and internal quotation marks omitted).

1007. *See, e.g.,* *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999); *Aponte Matos v. Toledo-Davila*, 135 F.3d 182, 192 (1st Cir. 1998); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

1008. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987) (“[W]hen supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates.”).

1009. *See* *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405, 436 (10th Cir. 2014) (no need for “special” qualified immunity analysis for supervisory official).

1010. *See infra* Chapter 11.

1011. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Following is a breakdown of standards by circuit for supervisory liability pre-*Iqbal*:

- *First Circuit*: *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 25 (1st Cir. 2006) (absent participation in challenged conduct, supervisor can be liable only if subordinate committed constitutional violation *and* supervisor’s action or inaction was “affirmatively linked” to violation in that it constituted supervisory encouragement, condonation, acquiescence, or gross negligence amounting to deliberate indifference); *Aponte Matos v. Toledo-Davila*, 135 F.3d 182, 192 (1st Cir. 1998) (superviso-

- ry encouragement, condonation, acquiescence, or deliberate indifference). *See also* *Wilson v. Town of Mendon*, 294 F.3d 1, 12–13 (1st Cir. 2002); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 12–13 (1st Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999).
- *Second Circuit*: *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (direct participation in wrongdoing, failure to remedy wrong after being informed of it, creation of policy or custom, grossly negligent supervision, or deliberately indifferent failure to act on information about constitutional violations). *See also* *Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).
  - *Third Circuit*: *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (supervisor must have personally directed or have had knowledge of and acquiesced in unlawful conduct). *See also* *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir. 1995).
  - *Fourth Circuit*: *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (actual or constructive knowledge of risk of constitutional injury and deliberate indifference to that risk and affirmative link between supervisor’s inaction and constitutional injury); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 513 U.S. 813, 814 (1994) (plaintiff must establish “(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed ‘a pervasive and unreasonable risk’ of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices;’ and (3) that there was an ‘affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered” (quoting *Miller v. Bearn*, 896 F.2d 848, 854 (4th Cir. 1990))). *See also* *Randall v. Prince George’s Cnty.*, 302 F.3d 188, 206 (4th Cir. 2002).
  - *Fifth Circuit*: *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 254 (5th Cir. 2005) (deliberate indifference standard; adopting *Farmer v. Brennan*, 511 U.S. 825 (1994), definition of deliberate indifference); *Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (deliberately indifferent training or supervision causally linked to violation of plaintiff’s rights).
  - *Sixth Circuit*: *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006) (“Plaintiff must also show that the supervisor somehow encouraged or condoned the actions of their inferiors. Plaintiff, however, presents evidence only that [the] supervisors . . . failed to review their subordinates’ work.” (citations omitted)); *Doe v. City of Roseville*, 296 F.3d 431, 440 (6th Cir. 2002) (“Supervisor liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he [or she] fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.”) (citing *Braddy v. Fla. Dep’t of Labor & Employment Sec.*, 133 F.3d 797, 802 (11th Cir. 1998)); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (supervisory liability cannot be based on mere failure to act; the supervi-

sor must have “at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending [subordinate] officers”) (citing *Hays v. Jefferson Cnty.*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982)); *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988). *See also* *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002).

- *Seventh Circuit*: *Jones v. Chicago*, 856 F.2d 985, 992–93 (7th Cir. 1988) (conduct of subordinate must have occurred with supervisor’s knowledge, consent, or deliberate indifference). *See also* *Gossmeier v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997).
- *Eighth Circuit*: *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (supervisor may be liable under § 1983 if (1) she had notice of subordinates’ unconstitutional actions; (2) she “[d]emonstrated deliberate indifference to or tacit authorization of the offensive acts”; and (3) her failure to act “proximately caused injury”).
- *Ninth Circuit*: *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) (“Supervisors can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) conduct that showed a reckless or callous indifference to the rights of others.”).
- *Tenth Circuit*: *Lankford v. City of Hobart*, 73 F.3d 283, 287 (10th Cir. 1996) (“personal direction” or actual knowledge of wrongdoing and acquiescence) (following *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993)).
- *Eleventh Circuit*: *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (supervisor (1) personally participated in unconstitutional conduct; (2) failed to correct widespread violations; (3) initiated custom or policy that was deliberately indifferent to constitutional rights; or (4) directed subordinates to act unconstitutionally or knew they would do so yet failed to stop them from doing so). *See also* *Dalrymple v. Reno*, 334 F.3d 991, 995–96 (11th Cir. 2003).
- *D.C. Circuit*: *Barham v. Ramsey*, 434 F.3d 565, 578 (D.C. Cir. 2006) (supervisory liability requires showing “supervisor . . . [knew] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what he might see”); *Int’l Action Center v. United States*, 365 F.3d 20, 25–28 (D.C. Cir. 2004) (supervisors must have had “actual or constructive knowledge of past transgressions or” been “responsible for or aware of ‘clearly deficient’ training”); *Haynesworth v. Miller*, 820 F.2d 1245, 1259–60 (D.C. Cir. 1987) (breach of duty to instruct subordinate to prevent constitutional harm).

1012. *Compare* *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989) (“[A] single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability. However, as the number of incidents grows and a pattern begins to emerge, a finding of tacit authorization or reckless disregard becomes more plausible.”), *with* *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567 (1st Cir. 1989) (“An inquiry into whether there has been a pattern of past abuses or official condonation thereof is only required when a plaintiff has sued a municipality. Where . . . plaintiff has brought suit against the defendants as individuals . . . plaintiff need only establish that the defendants’ acts or

omissions were the product of reckless or callous indifference to his constitutional rights and that they, in fact, caused his constitutional deprivations.”).

1013. *Iqbal*, 556 U.S. at 666.

1014. *Id.* at 667.

1015. *Id.* at 668.

1016. *Id.* at 677 (referring to “a § 1983 suit or a *Bivens* action”).

1017. *Id.* at 668.

1018. *Id.* at 680–81 (complaint references omitted).

1019. 550 U.S. 544 (2007).

1020. *Iqbal*, 556 U.S. at 683.

1021. *Id.* at 677 (citing Brief for Respondent 45–46).

1022. *Id.*

1023. *Id.* at 690–91 (quoting Brief for Petitioners, p. 50) (Souter, J., dissenting).

1024. *Id.* at 692 (Souter, J., dissenting) (“because of the [defendant’s] concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require”).

1025. *Id.* at 677.

1026. *Id.* at 683.

1027. *Id.* at 693–94 (Souter, J., dissenting) (citations omitted). Justice Souter was “unsure what the general test for supervisory liability should be, and in the absence of briefing and argument [was] in no position to choose or devise one.”

1028. *Lewis v. Tripp*, 604 F.3d 1221, 1227 n.3 (10th Cir. 2010). Selected post-*Iqbal* circuit decisions appear below.

- *Fifth Circuit*: *Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011) (“Under § 1983, . . . a government official can be held liable only for his own misconduct. *See* . . . *Iqbal*, [556 U.S. at 677]. Beyond his own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy.”).
- *Seventh Circuit*: *T.E. v. Grindle*, 599 F.3d 583, 588 (7th Cir. 2010) (holding, under *Iqbal*, Equal Protection claim against supervisor requires showing that supervisor acted with requisite discriminatory intent; although pre-*Iqbal* the Seventh Circuit allowed plaintiff to recover based on supervisor’s deliberate indifference, “after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite discriminatory intent”; court also ruled that *Iqbal* does not foreclose due process claim against supervisor based on supervisor’s own misconduct).
- *Eighth Circuit*: *L.L. Nelson Enters., Inc. v. Cnty. of St. Louis*, 673 F.3d 799, 810 (8th Cir. 2012) (under *Iqbal*, when “alleged constitutional violation requires proof of an impermissible motive, . . . complaint . . . must allege” supervisor acted with “impermissible purpose, not merely that he knew of a subordinate’s motive”); *Whitson v. Stone Cnty. Jail*, 602 F.3d 920, 928 (8th Cir. 2010) (ruling that under *Iqbal*, supervisory defendants may be held liable for attack on prisoner by fellow prisoner “only if they personally displayed deliberate indifference to the risk that [plaintiff] Watson would be assaulted during the transfer of prisoners”); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 535 (8th Cir. 2009) (en banc) (director of State Department of Correc-

tions could not be held liable for corrections officer's shackling plaintiff-prisoner to hospital bed while she was giving birth, in final stages of labor; citing *Iqbal*, finding director could be held liable on theory of "supervisory liability" "only if he personally displayed deliberate indifference to the hazards and pain resulting from shackling an inmate such as Nelson during the final states of labor"; no evidence that director was deliberately indifferent). *See also* *Ellis v. Houston*, 742 F.3d 307, 320, 322 (8th Cir. 2014).

- *Ninth Circuit*: *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916 (9th Cir. 2012) (en banc) (for supervisor to be liable for another actor's deprivation of third-party's constitutional rights, supervisor must have at least same level of intent as would be required if he directly violated third-party's constitutional rights); *Starr v. Baca*, 652 F.3d 1202, 1206–08 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101 (2012) (interpreting *Iqbal* to mean that supervisor's liability may vary depending on nature of plaintiff's constitutional claim; reading *Iqbal* as holding that in discrimination case "alleging a supervisor's mere awareness of the discriminatory effects of his or her actions or inaction does not state a claim of unconstitutional discrimination"; on the other hand, when as in this case, plaintiff-inmate asserts constitutional claim governed by deliberate-indifference standard, supervisor may be held liable for her own deliberate indifference, i.e., supervisor may be held liable based on her "knowledge of and acquiescence in unconstitutional conduct by others"). *See also* *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012); *Chavez v. United States*, 683 F.3d 1102, 1108–12 (9th Cir. 2012).
- *Tenth Circuit*: *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2150 (2011) (holding, under *Iqbal*, plaintiff may establish § 1983 liability of supervisory official by showing: (1) defendant (supervisor) promulgated, created, implemented, or possessed responsibility for continued operation of policy that (2) caused the complained of constitutional harm, and (3) acted with state of mind required to establish alleged constitutional deprivation). *See also* *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405, 435–36 (10th Cir. 2014); *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767, 771 (10th Cir. 2013).
- *D.C. Circuit*: *Navab-Safavi v. Glassman*, 637 F.3d 311, 319 (D.C. Cir. 2011) ("in actions against public officials for violation of constitutional rights, 'officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*'") (quoting *Iqbal*, 556 U.S. at 676).

### Chapter 13: Relationship Between Individual and Municipal Liability, p. 120

1029. Fed. R. Civ. P. 42(b). *See, e.g.*, *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999).

1030. 475 U.S. 796 (1986).

1031. *Id.* at 796–99.

1032. *See, e.g.*, *Williams v. Borough of W. Chester*, 891 F.2d 458, 467 (3d Cir. 1989); *Dodd v. City of Norwich*, 827 F.2d 1, 5 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

1033. *See* *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 305 (7th Cir.), *cert. denied*, 131 S. Ct. 643 (2010) (detainee denial of medical care case; holding jury verdict exonerating



individual jail medical technicians, but imposing liability against county, was not inconsistent; rejecting county's argument that individual officer liability required to impose municipal liability; "The actual rule . . . is much narrower: a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict." This depends on "the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth" (citing *Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002)). Based on the district court's jury instructions, "the jury could have found that [the medical technicians] were not *deliberately indifferent* to [the detainee's] medical needs, but simply could not respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms."); *Moyle v. Anderson*, 571 F.3d 814, 818 (8th Cir. 2009) ("There need not be a finding that a municipal employee is liable in his or her individual capacity before municipal liability can attach.") (citations omitted). See also *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002); *Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002); *Barrett v. Orange Cnty.*, 194 F.3d 341, 350 (2d Cir. 1999); *Anderson v. Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985); *Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 310 (10th Cir. 1985).

1034. See, e.g., *Askins v. Doe No. 1*, 727 F.3d 248, 252–54 (2d Cir. 2013); *Int'l Ground Transp., Inc. v. Mayor of Ocean City, Md.*, 475 F.3d 214 (4th Cir. 2007) (determination that individual officer/defendants are protected from liability by qualified immunity does not preclude imposition of municipal liability); *Prue v. City of Syracuse*, 26 F.3d 14, 19 (2d Cir. 1994); *Doe v. Sullivan Cnty.*, 956 F.2d 545, 554 (6th Cir.) ("dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor . . . that a municipality . . . may not be liable for that deprivation"), *cert. denied*, 506 U.S. 864 (1992). See also *Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012) (recognizing that ruling defendant-officer is protected by qualified immunity does not preclude municipal liability). However, if the defendant officer was protected by qualified immunity because she did not violate the plaintiff's federal rights, and there is no finding that any other officers violated plaintiff's rights, the municipality would be entitled to judgment.

1035. *Askins*, 727 F.3d at 253 (recognizing § 1983 plaintiff may choose to sue only municipality; she need not name official as defendant).

1036. *Manzanares v. City of Albuquerque*, 628 F.3d 1237 (10th Cir. 2010); *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006); *George v. City of Long Beach*, 973 F.2d 206 (9th Cir. 1992).

1037. *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999).

1038. *Id.* at 317.

1039. 445 U.S. 622 (1980).

1040. *Id.* at 657.

## Chapter 14: State Liability: The Eleventh Amendment, p. 123

1041. 491 U.S. 58 (1989).

1042. *Id.* at 71 n.10.

1043. 502 U.S. 21 (1991).

1044. *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 771 (2000) (*qui tam* action under False Claims Act); *Power v. Summers*, 226 F.3d 815, 818 (7th Cir. 2000) (applying *Vermont Agency* to § 1983 action). *Cf. Settles v. U.S. Parole Comm’n*, 429 F.3d 1098, 1104 (D.C. Cir. 2005) (“by failing to raise ... in the district court that it is not a ‘person’ under § 1983, the Commission” waived the issue). *See infra* Chapter 8.

1045. The Supreme Court has indicated that the *Will* “no person” defense is not waivable. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997).

1046. U.S. Const. amend. XI. The circuits are in conflict over whether a federal court must reach an Eleventh Amendment defense before addressing the merits. *See* authorities cited in *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 474–77 (6th Cir. 2006).

1047. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (holding citizen could not sue state in federal court without that state’s consent). *See Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (reaffirming *Hans*).

1048. *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

1049. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (stating that “when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its [Eleventh Amendment] sovereign immunity from suit even though individual officials are nominal defendants”) (quoting *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 464 (1945)). Even if a third party agrees to indemnify the state, the Eleventh Amendment still protects the state from a federal court monetary judgment. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997).

1050. 209 U.S. 123 (1908).

1051. *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). *See also Antrican v. Odom*, 290 F.3d 178, 185 (4th Cir. 2002) (observing that “simply because the implementation of such prospective relief would require the expenditure of substantial sums of [state] money does not remove a claim from the *Ex Parte Young* exception”).

1052. *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O’Connor, J., concurring)).

The Supreme Court held that a federal court *suit brought by a state agency* seeking prospective relief against state officials in their official capacities based upon ongoing violations of federal law is within the doctrine of *Ex parte Young*, and thus not barred by the Eleventh Amendment. *Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011). The Court in *Virginia Office* ruled that the validity of a *Young* claim does not “turn on the identity of the plaintiff,” *id.* at 1639, and that a state’s sovereignty interests are not more greatly diminished in a suit brought by a state agency than in a suit brought by a private party. *Id.* at 1640.

1053. *See Greenawalt v. Ind. Dep’t of Corr.*, 397 F.3d 587, 589 (7th Cir. 2005) (noting “section 1983 does not permit injunctive relief against state officials sued in their individual as distinct from their official capacity”).

1054. *See, e.g., Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

1055. *See Green v. Mansour*, 474 U.S. 64, 73 (1985).

1056. *See Hutto v. Finney*, 437 U.S. 678, 691 (1978).

1057. *See Frew v. Hawkins*, 540 U.S. 431, 440 (2004).

1058. *Hutto*, 437 U.S. at 690.

1059. 465 U.S. 89 (1984).

1060. *Id.* at 99–100.

1061. *Id.*

1062. *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

1063. *Id.*

1064. *See, e.g., Stoner v. Wis. Dep’t of Agric., Trade & Consumer Prot.*, 50 F.3d 481, 482–83 (7th Cir. 1995).

1065. *See Missouri v. Jenkins*, 495 U.S. 33, 56 n.20 (1990); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280–81 (1977). *See also* *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189, 194 (2006) (sovereign immunity does not protect municipalities); *People for Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 425 (D.C. Cir. 2005) (“The District of Columbia is a municipality for the purpose of § 1983.”).

1066. *See Mt. Healthy*, 429 U.S. at 280. The courts of appeals have articulated a variety of formulas to determine whether an entity is an arm of the state or of local government. *See, e.g., Ross v. Jefferson Cnty. Dep’t of Health*, 695 F.3d 1183, 1187 (11th Cir. 2012) (court should consider (1) how state law defines entity; (2) degree of state control over entity; (3) where entity derives funds; (4) who is responsible for judgment against entity); *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletic Dep’t*, 510 F.3d 681, 695–96 (7th Cir. 2007) (court should evaluate extent of entity’s financial autonomy from state, which requires consideration of: (1) extent of entity’s state funding; (2) state’s oversight and control of entity’s fiscal affairs; (3) entity’s ability to raise funds; (4) whether entity is subject to state taxation; and (5) whether judgment against entity would result in increase in state appropriations to entity; court should also consider entity’s general legal status); *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229–30 (3d Cir. 2006) (court should give “equal consideration” to: “payment from the state treasury, status under state law, and autonomy”; in “close cases,” the “prime guide” should be protecting state from federal court judgments payable out of state treasury); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (en banc) (court should consider “(1) whether the state would be responsible for a judgment . . . ; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity’s funding”; whether state will be liable for judgment is most important inquiry).

1067. *See Ernst*, 427 F.3d at 359 (“foremost factor . . . is the state treasury’s *potential* legal liability for the judgment, not whether the state treasury will pay for the judgment in *that* case”).

1068. *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237–39 (2d Cir. 2006).

1069. 429 U.S. 274 (1977).

1070. *Id.* at 280–81.

1071. 440 U.S. 391 (1979).

1072. *Id.* at 401. *See also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994) (holding injured railroad workers could assert federal statutory right under Federal Employers Liability Act to recover damages against Port Authority, and that concerns underlying Eleventh Amendment—“the States’ solvency and dignity”—were not touched).

1073. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). A state's waiver of sovereign immunity from liability in state court is not waiver of Eleventh Amendment immunity in federal courts. *Fla. Dep't of Health v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 149–50 (1981) (per curiam).

1074. *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002).

1075. *Id.* at 619.

1076. 506 U.S. 139 (1993).

1077. *Id.* at 144.

1078. *Id.* at 146. The law of the First Circuit, that the Commonwealth of Puerto Rico is treated as a state for purposes of the Eleventh Amendment, was not challenged in *Metcalfe & Eddy*, and the Court expressed no view on the issue. *Id.* at 141 n.1.

## Chapter 15: Personal-Capacity Claims: Absolute Immunities, p. 128

1079. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012).

1080. *Id.* at 1503 (Court has granted absolute immunity to legislators and judges for actions within legitimate scope of their authority, “prosecutors in their role as advocates, and the giving of testimony by witnesses at trial,” and “found no absolute immunity for the acts of the chief executive officer of a State, the senior and subordinate officers of a State’s National Guard, the president of a state university, school board members, the superintendent of a state hospital, police officers, prison officials and officers, and private co-conspirators of a judge”) (citations omitted).

1081. *Id.* at 1502 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

1082. *Id.* at 1503. “[T]he Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims.” *Id.* at 1504.

1083. *Id.* at 1503–05.

1084. *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). *See also Rehberg*, 132 S. Ct. at 1503.

1085. *See Forrester*, 484 U.S. 219.

1086. 131 S. Ct. 2074 (2011) (*Bivens* action).

1087. *Id.* at 2085.

1088. *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978). *See also Pierson v. Ray*, 386 U.S. 547, 553–54 (1967); *Bradley v. Fisher*, 80 U.S. 335, 347 (1872).

1089. *Stump*, 435 U.S. at 356–57 (quoting *Bradley*, 80 U.S. at 351).

1090. *Id.* at 356. *See, e.g., Gross v. Bell*, 585 F.3d 72, 84–85 (2d Cir. 2009) (judge’s erroneous assumption that he had personal jurisdiction did not deprive him of absolute immunity because he did not act in clear absence of all jurisdiction).

1091. *Mireles*, 502 U.S. at 12 (judge who ordered bailiff to use excessive force to bring attorney to courtroom performed judicial act); *Stump*, 435 U.S. at 362 (acts are judicial even though informal and irregular, e.g., no docket number, no filing with clerk’s office, and no notice to minor who was subject to sterilization order). *See also Sibley v. Lando*, 437 F.3d 1067, 1070 (11th Cir. 2005) (“Whether a judge’s actions were made while acting in his judicial capacity depends on whether: (1) the act complained of constituted a normal judicial function; (2) the events occurred in the judge’s chambers or in open court; (3) the

controversy involved a case pending before the judge; and (4) the confrontation arose immediately out of a visit to the judge in his judicial capacity.”); *Lowe v. Lesting*, 772 F.2d 308, 312 (7th Cir. 1985) (to determine whether act is “judicial,” courts examine (1) whether act is purely ministerial or requires exercise of discretion; (2) whether it is type of action normally performed by judge; and (3) the “expectations of the parties, i.e., whether the parties dealt with the judge as judge”).

*Examples of Judicial Acts:* *Bliven v. Hunt*, 579 F.3d 204, 211–14 (2d Cir. 2009) (state court judges’ and staff attorneys’ decisions concerning amount of compensation to be paid assigned counsel protected by absolute judicial immunity; function carried out was found analogous to setting reasonable fee under fee-shifting statutes); *Brookings v. Clunk*, 389 F.3d 614, 622 (6th Cir. 2004) (state judge “was engaged in a judicial act in swearing out a criminal complaint against [defendant] upon learning that he had committed a crime in his court”); *Barrett v. Harrington*, 130 F.3d 246, 260 (6th Cir. 1997) (“a judge instigating a criminal investigation against a disgruntled litigant who has harassed her is a judicial act”); *Martinez v. Winner*, 771 F.2d 424, 434–35 (10th Cir. 1985) (holding that installations of courtroom cameras was a judicial act; judge was both entitled and required to take steps to prevent criminal conduct in his courthouse).

*Examples of Nonjudicial Acts:* *Archie v. Lanier*, 95 F.3d 438, 441 (6th Cir. 1996) (holding that “stalking and sexually assaulting a person, no matter the circumstances, do not constitute ‘judicial acts’”); *Zarcone v. Perry*, 572 F.2d 52, 53 (2d Cir. 1978) (ordering coffee vendor handcuffed, and subjecting him to “pseudo-official inquisition” because judge did not like his coffee, are not judicial acts), *cert. denied*, 439 U.S. 1072 (1979).

1092. 386 U.S. 547 (1967).

1093. *Id.* at 553–55.

1094. *Id.* at 553–54 (quoting *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)).

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1095. 435 U.S. 349 (1978).

1096. *Id.* at 364.

1097. *Id.* at 356–57.

1098. 502 U.S. 9 (1991).

1099. *Id.* at 13.

1100. 484 U.S. 219 (1988).

1101. *Id.* at 230.

1102. *Id.* at 229.

1103. 466 U.S. 522 (1984).

1104. 42 U.S.C. § 1983(b).

1105. 42 U.S.C. § 1983 (2000) (as amended by Pub. L. No. 104-317, § 309(c), 110 Stat. 3847).

1106. *Roth v. King*, 449 F.3d 1272, 1286–87 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1210 (2007).

1107. 438 U.S. 478 (1978) (*Bivens* claim).

1108. *Id.* at 513.

1109. 474 U.S. 193 (1985) (*Bivens* claim).

1110. *Id.* at 204. In *Wood v. Strickland*, 420 U.S. 308, 320 (1975), the Court held that absolute immunity was not necessary to protect school board members' ability to exercise discretion in deciding how to discipline students.

The First Circuit, in *Bettencourt v. Board of Registration*, 904 F.2d 772 (1st Cir. 1990), held that in determining whether an official is entitled to absolute judicial immunity, courts should engage in the following analysis:

First, does a Board member, like a judge, perform a traditional "adjudicatory" function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect [the parties'] constitutional rights?

*Id.* at 783, *quoted in* *Dotzel v. Ashbridge*, 438 F.3d 320, 325 (3d Cir. 2006). *See also* *Applewhite v. Briber*, 506 F.3d 181, 182 (2d Cir. 2007) (state medical board members' revocation of medical license protected by absolute immunity because, *inter alia*, proceeding afforded adequate procedural safeguards), *cert. denied*, 552 U.S. 1296 (2008); *Buser v. Raymond*, 476 F.3d 565, 568–71 (8th Cir. 2007) (state chief medical officer who was absent from state board of medicine and surgery disciplinary hearings was protected by absolute quasi-judicial immunity because, *inter alia*, hearing process contained adequate procedural safeguards and was insulated from political influence).

1111. *Antoine v. Byers & Anderson*, 508 U.S. 429, 436–37 (1993).

1112. *Oliva v. Heller*, 839 F.2d 37, 39–40 (2d Cir. 1988), *cert. denied*, 519 U.S. 1118 (1997). *Accord* *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996).

1113. *See, e.g., Maness v. Dist. Court of Logan Cnty.-N. Div.*, 495 F.3d 943 (8th Cir. 2007) (§ 1983 complaint alleged state court clerk refused to present plaintiff's IFP application to county circuit court judge; court held that because clerk's conduct was ministerial rather than discretionary, claim was governed by qualified rather than by absolute immunity; the clerk, however, prevailed under qualified immunity).

1114. *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976). *See also* *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

1115. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

1116. *See, e.g., Hart v. Hodges*, 587 F.3d 1288 (11th Cir. 2009) (prosecutor protected by absolute immunity even for actions in violation of state court order), *cert. denied*, 130 S. Ct. 3389 (2010).

1117. *Shmueli v. City of N.Y.*, 424 F.3d 231, 237 (2d Cir. 2005) (citing *Bernard v. Cnty. of Suffolk*, 356 F.3d 495 (2d Cir. 2004)).

1118. *Reasonover v. St. Louis Cnty.*, 447 F.3d 569, 580 (8th Cir. 2006).

1119. 424 U.S. 409 (1976).

1120. *Id.* at 431.

1121. *Id.*

1122. *Id.* at 430–31.

1123. *See, e.g., Simon v. City of N.Y.*, 727 F.3d 167, 171–74 (2d Cir. 2013) (although prosecutor's application for material witness warrant is protected by absolute immunity, prosecutor's participation in execution of warrant is governed by qualified immunity), *cert.*

*denied*, 134 S. Ct. 1934 (2014); *Slater v. Clarke*, 700 F.3d 1200, 1203 (9th Cir. 2012) (decision by prosecutor and other officials not to extradite or to request only limited extradition protected by absolute immunity); *Giraldo v. Kessler*, 694 F.3d 161, 167 (2d Cir. 2012) (prosecutors who detained and conducted lengthy interview of female victim of domestic abuse incident following arrest of boyfriend protected by absolute prosecutorial immunity; interview was integral part of advocacy functions, namely, making decisions concerning, e.g., pursuit of charges, arraignment, and bail); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 914, 928–34 (9th Cir. 2012) (en banc) (county attorney’s appointment of special prosecutor protected by absolute prosecutorial immunity; but special prosecutor’s ordering warrantless arrest not protected by absolute immunity because he acted outside role of advocate); *Koubriti v. Convertino*, 593 F.3d 459, 467–69 (6th Cir. 2010) (*Bivens* action) (*Brady* claims based on allegations prosecutor directed FBI agent not to record witness interviews defeated by absolute prosecutorial immunity); *Warney v. Monroe Cnty.*, 587 F.3d 113, 120–26 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 82 (2010) (prosecutor’s delay during postconviction proceedings in disclosing exculpatory evidence to defense); *Cady v. Arenac Cnty.*, 574 F.3d 334, 341 (6th Cir. 2009) (prosecutor who enters into release dismissal agreement protected by absolute prosecutorial immunity: entering into such an agreement with criminal defendant is one way prosecutor may resolve case in his role as advocate for state); *Brown v. Cal. Dep’t of Corr.*, 554 F.3d 747, 750–51 (9th Cir. 2009) (prosecutor’s parole recommendation protected by absolute prosecutorial immunity defense because “parole decisions are a continuation of the sentencing process”).

Although a § 1983 malicious prosecution claim against a prosecutor would be barred by absolute prosecutorial immunity, it may be asserted against a law enforcement officer who influenced a prosecutor to initiate a prosecution. *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006).

1124. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). *See also* *Hoog-Watson v. Guadalupe Cnty.*, 591 F.3d 431 (5th Cir. 2009) (county attorney’s participation in search and seizure of property was investigative function not protected by absolute prosecutorial immunity); *Harris v. Bornhorst*, 513 F.3d 503 (6th Cir.) (prosecutor’s instruction to police to arrest suspect not protected by absolute immunity because prosecutor acted in administrative or investigative capacity), *cert. denied*, 554 U.S. 903 (2008).

1125. *Buckley*, 509 U.S. at 277–78.

1126. *Id.* *See* *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014) (prosecutor who fabricated evidence prior to suspect’s arrest may be held liable under § 1983 if he participated either in indicting or trying criminal defendant).

1127. *Burns v. Reed*, 500 U.S. 478, 492–96 (1991).

1128. *Lacey*, 693 F.3d at 914.

1129. *Simon v. City of N.Y.*, 727 F.3d 167, 171–74 (2d Cir. 2013).

1130. *Buckley*, 509 U.S. at 273 (“There is a difference between the advocate’s role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective’s role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is ‘neither appropriate nor justifiable that, for the same act, immunity should protect the

one and not the other.” (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974))).

1131. 555 U.S. 335 (2009).

1132. 500 U.S. 478 (1991).

1133. *Id.* at 487.

1134. *Id.* at 492.

1135. *Id.* at 496.

1136. *Id.* at 491.

1137. *Id.* at 493.

1138. *Id.* at 495 (emphasis added).

1139. 509 U.S. 259 (1993).

1140. *Id.* at 272–77.

1141. *Id.* at 274–78.

1142. *Id.* at 274.

1143. *Id.* at 274 n.5.

1144. 522 U.S. 118 (1997).

1145. As discussed in the next section concerning witness immunity, complaining witnesses have not been protected by absolute immunity.

1146. 555 U.S. 335 (2009).

1147. *Brady v. Maryland*, 373 U.S. 83 (1963).

1148. *Van de Kamp*, 555 U.S. at 339.

1149. *Id.* at 341.

1150. *Id.* at 343.

1151. *Id.* at 344.

1152. *Id.*

1153. *Id.*

1154. *Id.* at 346.

1155. *Id.* at 347.

1156. *Id.* at 348.

1157. *Id.* at 348–49.

1158. *Id.* at 349.

1159. 587 F.3d 113 (2d Cir. 2009).

1160. *Id.* at 121.

1161. *Id.* at 123.

1162. *Id.* The Second Circuit noted that prosecutors are ethically bound to disclose exculpatory material postconviction, and in extreme cases, may be subject to criminal prosecution. *Warney*, 587 F.3d at 125.

1163. *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990).

1164. Following are illustrative courts of appeals decisions, by circuit, concerning social worker immunity: *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992); *Doe v. Whelan*, 732 F.3d 151 (2d Cir. 2013); *V.S. v. Muhammad*, 595 F.3d 426 (2d Cir. 2010); *Ernst v. Child & Youth Servs.*, 108 F.3d 486 (3d Cir.), *cert. denied*, 522 U.S. 850 (1997); *White v. Chambliss*, 112 F.3d 731 (4th Cir.), *cert. denied*, 522 U.S. 913 (1997); *Wernecke v. Garcia*, 591 F.3d 386 (5th Cir. 2009); *Kovacic v. Cuyahoga Cnty. Dep’t of Children & Family Servs.*, 724 F.3d 687



(6th Cir. 2013); *Andrews v. Hickman Cnty.*, 700 F.3d 845 (6th Cir. 2012); *Xiong v. Wagner*, 700 F.3d 282 (7th Cir. 2012); *Hutson v. Walker*, 688 F.3d 477 (8th Cir. 2012); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833 (9th Cir. 2010); *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991); *Loftus v. Clark-Moore*, 690 F.3d 1200 (11th Cir. 2012); *Gray v. Poole*, 275 F.3d 1113 (D.C. Cir. 2002).

1165. 460 U.S. 325 (1983).

1166. *Id.* at 333.

1167. *Id.* at 343. Even prior to *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012), discussed at pages 139–41, lower federal courts generally applied absolute witness immunity to alleged conspiracies to give false testimony, *see, e.g.*, *Muldowan v. City of Warren*, 578 F.3d 351, 389–90 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 3504 (2010); to witness preparation, *see, e.g.*, *Latta v. Chapala*, 221 F. App'x 443 (7th Cir. 2007); and to testimony in quasi-judicial proceedings, *see, e.g.*, *Rolon v. Henneman*, 517 F.3d 140 (2d Cir. 2008).

1168. 132 S. Ct. 1497 (2012).

1169. *Id.* at 1505.

1170. *Id.* at 1506 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part)).

1171. *Id.* at 1506–07.

1172. *Id.* at 1507 (citing *Kalina*, 522 U.S. at 131; *Malley*, 475 U.S. at 340–41).

1173. *Id.* at 1507 n.1. For example, only qualified immunity is accorded law enforcement officials who falsify affidavits or fabricate evidence concerning an unresolved crime. *Id.* The Second Circuit held that *Rehberg* did not preclude use of grand jury testimony to impeach the credibility of the defendant law enforcement officer. *Marshall v. Randall*, 719 F.3d 113, 115–18 (2d Cir. 2013).

1174. *Rehberg*, 132 S. Ct. at 1507–08.

1175. *Id.* at 1507.

1176. *Id.*

1177. *Id.* at 1508.

1178. *Id.* at 1510 (citing *Brice v. Nkaru*, 220 F.3d 233, 239 n.6 (4th Cir. 2000); *Curtis v. Bembenek*, 48 F.3d 281, 284–85 (7th Cir. 1995)).

1179. *See, e.g.*, *Rolon v. Henneman*, 517 F.3d 140 (2d Cir. 2008) (absolute immunity protected witness who testified in arbitration proceeding with procedural safeguards nearly identical to those in judicial proceedings).

1180. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

1181. *See, e.g.*, *Bogan*, 523 U.S. at 55 (city council member who introduced budget eliminating plaintiff's employment position and mayor who signed bill into law protected by absolute immunity); *Sup. Ct. of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 734 (1980) (state judges' promulgation of attorney professional responsibility rules was protected by absolute immunity); *Tenney*, 341 U.S. at 377 (legislators who carried out a legislative investigation were protected by absolute immunity because "investigations, whether by standing or special committees, are an established part of representative government").

1182. *Bogan*, 523 U.S. at 54. *See also* *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 213–14 (1st Cir. 2005) (governor’s signing of bill into law protected by absolute immunity regardless of motive or intent).

1183. *See* 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 9.08[B][5] (4th ed. 2014).

1184. 523 U.S. 44 (1998).

1185. *Id.* at 48–49 (noting absolute legislative immunity “fully applicable to local legislators”).

1186. *Id.* at 55.

1187. *Id.*

1188. 440 U.S. 391 (1979).

1189. *Id.* at 394.

1190. 446 U.S. 719 (1980).

1191. *Id.* at 731–34.

1192. *Id.* at 734.

1193. *Id.* at 732; *Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Cir. 2005); *Star Distrib. Ltd. v. Marino*, 613 F.2d 4, 6 (2d Cir. 1980).

1194. *Star*, 613 F.2d at 7 (relying on *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 503 (1974)).

1195. Qualified immunity is not applicable to claims for injunctive relief. *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996).

1196. *See* *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *Accord* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014); *Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011); *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

1197. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also* *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam); *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 4–7 (2013) (per curiam); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244–45 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Saucier*, 533 U.S. at 201; *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987); *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986); *Davis v. Scherer*, 468 U.S. 183, 190–91 (1984). *See also* *Gonzalez v. City of Schenectady*, 728 F.3d 149, 161 (2d Cir. 2013) (police officers only expected “to be familiar with black-letter law applicable to commonly encountered situations . . .”); *Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013) (to determine whether defendant violated clearly established federal law, issue “is not how courts or lawyers might have understood the state of the law at the time of the challenged conduct,” but “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted”) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Several of the Supreme Court qualified immunity decisions are in *Bivens* actions. The same qualified immunity analysis applies in § 1983 suits and *Bivens* suits. *Wilson*, 526 U.S. at 609; *Davis*, 468 U.S. at 194.

1198. *Handt v. Lynch*, 681 F.3d 939, 945 (2012).

1199. *Davis*, 468 U.S. at 191.

1200. *Pearson*, 555 U.S. at 231. *Accord* *Wood v. Moss*, 134 S. Ct. 2056, 2065 (2014).

1201. *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *Accord* *Messerschmidt*, 132 S. Ct. at 1244–45.

1202. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

1203. Although the courts have articulated a variety of two- and three-part qualified immunity tests, the author believes that the essential qualified immunity question is whether the officer violated clearly established federal law. 1A Schwartz, *supra* note 1183, § 9A.04. See, e.g., *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (three-part test); *Causey v. City of Bay City*, 443 F.3d 524, 528 n.2 (6th Cir. 2006) (observing that Sixth Circuit employs both two- and three-part tests); *Frederick v. Morse*, 439 F.3d 1114, 1122–23 (9th Cir. 2006) (three-part test); *Borges-Colon v. Roman Abreu*, 438 F.3d 1, 18–19 (1st Cir. 2006) (three-part test); *Wilson v. Flynn*, 429 F.2d 465, 467 (4th Cir. 2005) (two-part approach); *Tinker v. Beasley*, 429 F.3d 1324, 1326 (11th Cir. 2005) (three-step approach). For a cogent criticism of multipart tests, see *Walczyk*, 496 F.3d at 165–71 (Sotomayor, J., concurring).

1204. *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

1205. See, e.g., *Amore v. Navarro*, 624 F.3d 522, 535 (2d Cir. 2010) (on § 1983 warrantless arrest claim, court does not consider officer’s subjective intent, but does consider information known to officer at time of arrest).

1206. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *United States v. Lanier*, 520 U.S. 259, 270 (1997). *Accord* *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

1207. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). *Accord* *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005); *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004).

1208. 533 U.S. 194 (2001), *overruled in part*, *Pearson v. Callahan*, 555 U.S. 223 (2009).

1209. *Saucier*, 533 U.S. at 205.

1210. *Id.* at 206.

1211. *Id.* at 205.

1212. *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (constitutional issue concerns reasonableness of officer’s mistake of fact, while qualified immunity issue of “clearly established law” concerns reasonableness of officer’s mistake of law), *cert. denied*, 132 S. Ct. 1032 (2012). See *supra* p. 59.

1213. *Pearson*, 555 U.S. at 231 (Alito, J.) (dictum) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

1214. See, e.g., *Stearns v. Clarkson*, 615 F.3d 1278, 1284–85 (10th Cir. 2010) (“fact that an officer obtains a prosecutor’s determination of probable cause is only one factor that is relevant to the qualified immunity analysis”); *Moss v. Martin*, 614 F.3d 707, 712 (7th Cir. 2010) (weight court gives to officer’s reliance on advice of counsel “depends on such factors like how much information counsel had and how closely tailored the advice was to the [law] in question”); *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (“following orders” defense not respected in American jurisprudence); *Ewing v. City of Stockton*, 588 F.3d 1218, 1231 (9th Cir. 2009) (while officer’s consultation with counsel does not automatically insulate officer from liability, it goes far to establish qualified immunity); *Lawrence v. Reed*, 406 F.3d 1224, 1230–31 (10th Cir. 2005). However, in some circumstances, official

conduct pursuant to advice of counsel may render the official's conduct objectively reasonable and, therefore, protected by qualified immunity. *See, e.g., Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 236 (1st Cir. 2007) (while acknowledging that acting on advice of counsel alone will not provide protection under qualified immunity, court ruled that defendants were protected by qualified immunity because their reliance on advice of government counsel, which they were required to follow, was not unreasonable). *See also Fleming v. Livingston Cnty.*, 674 F.3d 874, 881 (7th Cir. 2012) (police officer consulting state's attorney "goes a long way toward solidifying his qualified immunity defense"); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 255–56 (3d Cir. 2010) (police officer who in good faith relied on prosecutor's legal opinion that arrest is lawful is presumptively entitled to qualified immunity on claim arrest not supported by probable cause; plaintiff may rebut presumption by showing reasonable officer would not have relied on prosecutor's advice).

*Presumptively Valid Statute:* An officer who acted pursuant to a presumptively constitutional state statute or ordinance subsequently found to be unconstitutional will likely be protected by qualified immunity. *See, e.g., Acosta v. City of Costa Mesa*, 718 F.3d 800, 823 (9th Cir. 2013); *Connecticut v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003); *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994).

1215. 132 S. Ct. 1235 (2012).

1216. *Messerschmidt*, 132 S. Ct. at 1249 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *See also Armstrong v. Asselin*, 734 F.3d 984, 991–94 (9th Cir. 2013). *Cf. Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. May 30, 2014) (arresting officer not protected by qualified immunity because state penal law was clearly unconstitutional).

1217. *Messerschmidt*, 132 S. Ct. at 1250. To hold that the defendants/officers were not entitled to qualified immunity would mean that not only were they "plainly incompetent," but that their supervisor, the deputy district attorney, and the magistrate [who issued the warrant] were as well." *Id.* at 1249 (citation omitted).

1218. *See* decisions cited in 1A Schwartz, *supra* note 1183, § 9A.05[D].

1219. *See, e.g., Messerschmidt*, 132 S. Ct. 1235; *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364 (2009); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Malley v. Briggs*, 475 U.S. 335 (1986).

1220. 521 U.S. 399 (1997).

1221. 504 U.S. 158 (1992).

1222. *See Clement v. City of Glendale*, 518 F.3d 1090 (9th Cir. 2008); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993).

1223. For post-*Richardson* decisions, *compare, e.g., Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005) (forensic odontologist retained by district attorney's office to evaluate bite-mark evidence as part of criminal investigation was engaged in state action and entitled to assert qualified immunity), *and Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998) (psychiatrists under contract with state to assist police department in evaluating police officers entitled to assert qualified immunity because they performed necessary

function within police department), *cert. denied*, 525 U.S. 1105 (1999), with *Jensen v. Lane Cnty.*, 222 F.3d 570, 577 (9th Cir. 2000) (private physician who provided services to county relating to civil commitment not entitled to assert qualified immunity), and *Halvorsen v. Baird*, 146 F.3d 680, 685 (9th Cir. 1998) (private not-for-profit organization providing municipality with involuntary commitment services for inebriates not entitled to assert qualified immunity; fact that organization was not for profit not sufficient basis for distinguishing *Richardson*).

For pre-*Richardson* decisions allowing the private party defendant to assert qualified immunity, see *Young v. Murphy*, 90 F.3d 1225, 1234 (7th Cir. 1996) (private doctor hired by county to evaluate individual's mental competency); *Sherman v. Four County Counseling Center*, 987 F.2d 397, 403 (7th Cir. 1993) (private hospital that accepted and treated mental patients pursuant to court order). See also 1A Schwartz, *supra* note 1183, § 9.15.

1224. *Richardson*, 521 U.S. at 413.

1225. 132 S. Ct. 1657 (2012).

1226. The Court seemed to assume that the attorney was engaged in state action. "Anyone whose conduct is 'fairly attributable to the state' can be sued as a state actor under § 1983." *Filarsky*, 132 S. Ct. at 1661 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Lack of immunity of part-time city workers may "deprive state actors of the ability to 'reasonably anticipate when their conduct may give rise to liability for damages.'" *Id.* at 1666 (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)).

1227. *Filarsky*, 132 S. Ct. at 1663–64.

1228. *Id.* at 1665–66. Granting qualified immunity to individuals hired by government to carry out investigatory functions also avoids "significant line-drawing problems. It is unclear, for example, how *Filarsky* would be categorized if he regularly spent half his time working for the City, or worked exclusively on one City project for an entire year. . . . An uncertain immunity is little better than no immunity at all." *Id.* at 1666.

1229. *Id.* at 1667.

1230. *Fourth Circuit*: *Gregg v. Ham*, 678 F.3d 333, 339–41 (4th Cir. 2012) (bail bondsman not entitled to assert qualified immunity because he doesn't carry out public function and historically not afforded immunity).

*Sixth Circuit*: *McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012) (psychiatrist, employed by nonprofit organization but working part-time for county as prison psychiatrist, not entitled to assert qualified immunity; no common-law tradition of immunity for private doctor working for public institution, and same market forces at play in *Richardson* suggest inappropriateness of immunity in instant case).

1231. See *Lane v. Franks*, 189 L. Ed. 2d 312 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Wilson v. Layne*, 526 U.S. 603 (1999).

1232. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). See also *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (qualified immunity analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition"). Accord *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014); *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

1233. *Anderson*, 483 U.S. at 640. However, the facts of the existing precedent need not be “materially similar” to those of the instant case. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The issue is necessarily a question of degree.

1234. *See, e.g.*, *Dorheim v. Sholes*, 430 F.3d 919, 926 (8th Cir. 2005) (need to weigh competing interests makes it difficult for plaintiff “to overcome a qualified immunity defense in the context of a child abuse investigation”); *Manzano v. S.D. Dep’t of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995) (same).

1235. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). *See also* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011); *Pearson v. Callahan*, 555 U.S. 223, 244–45 (2009).

1236. *See Wilson*, 526 U.S. at 620–21 (Stevens, J., dissenting). *See also* *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

1237. *See, e.g.*, *Lane v. Franks*, 189 L. Ed. 2d 312 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam); *Reichle*, 132 S. Ct. at 2096–97; *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378–79 (2009); *Wilson*, 526 U.S. at 617.

1238. *Wilson*, 526 U.S. at 618. *Accord Reichle*, 132 S. Ct. at 2096.

1239. 536 U.S. 730 (2002).

1240. *Id.* at 741.

1241. *Id.* at 745.

1242. 131 S. Ct. 2074 (2011) (*Bivens* action).

1243. *Id.* at 2083 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Malley v. Briggs*, 475 U.S. 335 (1986)).

1244. *al-Kidd*, 131 S. Ct. at 2084. The Supreme Court thus found that the circuit court erred in relying on broad historical principles underlying the Fourth Amendment. *Id.* *See also* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014); *Reichle*, 132 S. Ct. at 2093–94.

1245. *al-Kidd*, 131 S. Ct. at 2083–84.

1246. *Id.* at 2084 (quoting *Wilson*, 526 U.S. at 617).

1247. *Id.* at 2085.

1248. 557 U.S. 364 (2009).

1249. *Id.* at 377 (quoting *K.H. v. Morgan*, 914 F.3d 846, 851 (7th Cir. 1990)).

1250. *Id.* at 377–78 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

1251. *Id.* at 378–79. When the United States overturns its own precedent, officials who relied on the prior precedent are protected by qualified immunity. *Arizona v. Gant*, 556 U.S. 332, 350 n.11 (2009) (dictum).

1252. *Redding*, 557 U.S. at 378.

1253. *Anderson v. Creighton*, 483 U.S. 635, 643–45 (1987); *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986). *See also* *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam); *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (per curiam) (“reasonable police officers in [the defendant-officers’] position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent”).

1254. 475 U.S. 335 (1986).

1255. *Id.* at 343–46.

1256. *Id.* at 344–45.

1257. *Id.* at 344 (citing *United States v. Leon*, 468 U.S. 897 (1984) (objective reasonableness is standard for search pursuant to invalid search warrant)).

1258. *Leon*, 468 U.S. 897.

1259. 132 S. Ct. 1235 (2012).

1260. *Id.* at 1245. “[T]he same standard of objective reasonableness that [the Court] applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer who obtained or relied on an allegedly invalid warrant.” *Messerschmidt*, 132 S. Ct. at 1245 n.1 (citations omitted). *See also* *Armstrong v. Asselin*, 734 F.3d 984, 991–94 (9th Cir. 2013).

1261. *Messerschmidt*, 132 S. Ct. at 1245 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

1262. *Id.* at 1245 (quoting *Leon*, 468 U.S. at 923).

1263. *Id.* at 1249 (quoting *Malley*, 475 U.S. at 341).

1264. *Id.* at 1250. There was no claim that the affidavit in support of the application for the warrant was misleading because it omitted material facts. *Id.* at 1245 n.2. The Court in *Messerschmidt* distinguished *Groh v. Ramirez*, 540 U.S. 551 (2004), on the ground that in *Groh* the search warrant’s failure to include a description of the person or property to be seized was a “glaring deficiency” that rendered the warrant invalid on even a “ cursory reading of the warrant.” *Id.* at 1250 (quoting *Groh*, 540 U.S. at 554–55 n.2). Any defect in *Messerschmidt* “would not have been obvious from the face of the warrant.” *Id.*

1265. *Messerschmidt*, 132 S. Ct. at 1249–50. To hold that the defendant-officers were not protected by qualified immunity would mean that not only were they “plainly incompetent,” but that their supervisor, the deputy district attorney, and the magistrate were as well.” *Id.* at 1249 (citation omitted).

1266. 483 U.S. 635 (1987).

1267. *Id.* at 640.

1268. *Id.* The Supreme Court adhered to this approach in its later per curiam decision, *Hunter v. Bryant*, 502 U.S. 224 (1991). The Court explained that the proper inquiry is whether the officials “acted reasonably under settled law in the circumstances, not whether another, or more reasonable interpretation of events can be constructed.” *Id.* at 228.

1269. *Anderson*, 483 U.S. at 641.

1270. *See Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam).

1271. *Anderson*, 483 U.S. at 641.

1272. *Id.* at 640.

1273. 533 U.S. 194 (2001), *overruled in part*, *Pearson v. Callahan*, 555 U.S. 223 (2009).

1274. 490 U.S. 386 (1989).

1275. *Saucier*, 533 U.S. at 201–02. *See also* *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004).

1276. *Saucier*, 533 U.S. at 203; *Anderson*, 483 U.S. at 643.

1277. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 227 (1991). *See Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007) (“arguable” probable cause does not mean “almost” probable cause; essential inquiry is whether it was objectively reasonable to conclude there was probable cause).

1278. *Saucier*, 533 U.S. at 205.



1279. 523 U.S. 574 (1998).

1280. *Id.* at 594–97.

1281. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). *Accord Crawford-El*, 523 U.S. at 586; *Siebert v. Gilley*, 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Thomas v. Independence Twp.*, 463 F.3d 285, 293 (3d Cir. 2006). *See* Fed. R. Civ. P. 8(C) (affirmative defense must be raised in answer). The plaintiff does not have the burden of pleading facts relevant to the qualified immunity defense. *Thomas*, 463 F.3d at 292–94.

1282. *See, e.g., Pasco v. Knoblauch*, 566 F.3d 572, 577–78 (5th Cir. 2009); *Stephenson v. Doe*, 332 F.3d 68, 75–76 (2d Cir. 2003). *See also* cases discussed in 1A Schwartz, *supra* note 1183, § 9.14[C][2][b].

1283. 556 U.S. 662 (2009) (*Bivens* action).

1284. 550 U.S. 544 (2007).

1285. *Iqbal*, 556 U.S. at 669.

1286. *See Randall v. Scott*, 610 F.3d 701, 708–10 (11th Cir. 2010) (§ 1983 claims subject to qualified immunity are governed by *Iqbal* plausibility pleading standard).

1287. *Iqbal*, 556 U.S. at 678.

1288. *Id.* at 679.

1289. *Id.* at 684–85.

1290. *Id.* at 685 (citation omitted). The Court also ruled that Fed. R. Civ. P. 9(b), which, *inter alia*, allows intent to be “alleged generally,” “merely excuses a party from pleading discriminatory intent under an elevated pleading standard,” and “does not give him license to evade the less rigid—though still operative—strictures of [Fed. R. Civ. P.] 8.” *Id.* at 686–87 (citations omitted).

1291. *See, e.g., Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012); *Purvis v. Oest*, 614 F.3d 713, 717 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2991 (2011); *Roska v. Sneddon*, 437 F.3d 964, 971 (10th Cir. 2006); *Ciminillo v. Streicher*, 434 F.3d 461, 466 (6th Cir. 2006); *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc); *Hicks v. Feeney*, 850 F.2d 152, 159 (2d Cir. 1988).

1292. *Lee v. Sandberg*, 136 F.3d 94, 101 (2d Cir. 1997); *Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997); *Conn. Crim. Def. Lawyers Ass’n v. Forst* (*In re State Police Litig.*), 88 F.3d 111, 123 (2d Cir. 1996).

1293. *See Behrens v. Pelletier*, 516 U.S. 299, 308–09 (1996) (motion to dismiss); *Ortiz v. Jordan*, 131 S. Ct. 884, 889–90 (2011) (motion for summary judgment or for judgment as matter of law).

1294. *See, e.g., Warlik v. Cross*, 969 F.2d 303 (7th Cir. 1992). *See generally* *Ortiz v. Jordan*, 131 S. Ct. 884 (2011).

1295. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004); *Williams v. Ala. State Univ.*, 102 F.3d 1179, 1182 (11th Cir. 1997).

1296. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

1297. *Id.*; *Williams*, 102 F.3d at 1182.

1298. *See Hunter v. Bryant*, 502 U.S. 224, 227–28 (1991). *See also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). Qualified immunity seeks to free officials from “disruptive



discovery.” *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

1299. 502 U.S. 224 (1991).

1300. *Id.* at 228. *Accord* *Wood v. Moss*, 134 S. Ct. 2056, 2065 n.4 (2014).

1301. *Hunter*, 502 U.S. at 228. *Accord* *Anderson*, 483 U.S. at 646 n.6.

1302. *Anderson*, 483 U.S. at 646 n.6; *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

1303. *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996).

1304. *See also id.* at 306 (“Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.” (internal quotation marks and citation omitted)).

1305. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (plurality opinion).

1306. 457 U.S. 800 (1982).

1307. *Anderson*, 483 U.S. at 646 n.6.

1308. *Lewis v. City of Fort Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quotation omitted). *See* Fed. R. Civ. P. 56(f).

1309. 523 U.S. 574 (1998).

1310. *Id.* at 598–99.

1311. *Id.* at 599.

1312. *Id.*

1313. *Id.* at 599 n.20.

1314. *Id.* at 600 (quoting 28 U.S.C. § 1915(e)(2) (Supp. 1998)).

1315. *Id.* at 601.

1316. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

1317. 134 S. Ct. 1861, 1865–68 (2014) (per curiam).

1318. 550 U.S. 372 (2007), discussed *supra* Chapter 5, § V.3.

1319. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

1320. 131 S. Ct. 884 (2011).

1321. *See* *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). *See also* *Mitchell*, 472 U.S. at 526; *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

1322. *See, e.g.,* *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 459 (9th Cir. 2013) (post-verdict court must apply qualified immunity framework to facts found by jury); *Cortes-Reyes v. Salas-Quintana*, 608 F.3d 41, 51 n.10 (1st Cir. 2010) (district court erroneously submitted qualified immunity to jury; whether defendant protected by qualified immunity is legal question for court, and jury’s role is to determine any preliminary factual questions); *Gonzales v. Duran*, 590 F.3d 855, 859–61 (10th Cir. 2009) (when facts relevant to qualified immunity in dispute, district court should submit special interrogatories to jury to determine facts, and should reserve for itself legal issue of qualified immunity; in rare cases when narrow issues of disputed material facts are dispositive of qualified immunity defense, district court may define clearly established law for jury and instruct jury to decide qualified immunity defense, i.e., whether defendant’s conduct was objectively reasonable under clearly established law defined by court; it is never proper to allow jury to determine what is clearly established law); *Torres v. City of L.A.*, 548 F.3d 1197, 1211 (9th Cir. 2008) (qualified immunity may be submitted to jury when historical facts material to qualified immunity in dispute), *cert. denied*, 129 S. Ct. 1995 (2009). For other decisions taking this

position, *see* *Curley v. Klem*, 499 F.3d 199, 211–15 (3d Cir. 2007); *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005); *Littrell v. Franklin*, 388 F.3d 578, 584–85 (8th Cir. 2004); *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004); *Stephenson v. Doe*, 332 F.3d 68, 80–81 (2d Cir. 2003); *Johnson v. Breeden*, 280 F.3d 1308, 1319 (11th Cir. 2002). *But see* *Brown v. Sudduth*, 675 F.3d 472, 482 (5th Cir. 2012) (“A jury may be given the issue of qualified immunity if that defense was not resolved on summary judgment.”) (citing *Melear v. Separs*, 862 F.2d 1177, 1184 (5th Cir. 1989)); *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000) (jury may decide qualified immunity defense); *Presley v. City of Benbrook*, 4 F.3d 405, 409 (5th Cir. 1993) (same). *See also* *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) (citations omitted):

Once the jury has resolved any disputed facts that are material to the qualified immunity issue, the ultimate determination of whether the officer’s conduct was objectively reasonable is to be made by the court. . . . To the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question. If the defendant does not make such a request, he is not entitled to have the court, in lieu of the jury, make the needed factual finding.

1323. *Rodriguez-Marin v. Rivera-Gonzales*, 438 F.3d 72, 83 (1st Cir. 2006). *Accord Curley*, 499 F.3d at 215 (qualified immunity focuses on “established legal standards and requires a review of relevant case law, a review a jury simply cannot make”).

1324. 533 U.S. 194 (2001), *overruled in part*, *Pearson v. Callahan*, 555 U.S. 223 (2009).

1325. *Saucier*, 533 U.S. at 201. For decisions that reached the same result, *see Harris*, 550 U.S. at 377; *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siebert v. Gilley*, 500 U.S. 226, 231 (1991).

1326. 555 U.S. 223 (2009).

1327. *Accord Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011); *Camreta v. Green*, 131 S. Ct. 2020, 2031 (2011).

1328. *Pearson*, 555 U.S. at 242–43.

1329. *Id.* at 236 (quoting *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

1330. *Id.*

1331. *Id.* at 242. *See, e.g., Plumhoff*, 134 S. Ct. at 2020. When a circuit court follows the two-step procedure and decides both issues, the Supreme Court has “discretion to correct errors at each step.” *al-Kidd*, 131 S. Ct. at 2080. When the court of appeals finds that the defendant acted unconstitutionally, but is protected by qualified immunity because she did not violate clearly established federal law, the Supreme Court has discretion to review the decision of the circuit court, so long as an Article III case or controversy remains between the parties. *Camreta v. Greene*, 131 S. Ct. 2020 (2011).

1332. *Pearson*, 555 U.S. at 237, 239. *See also Reichle*, 132 S. Ct. at 2093 (court exercised discretion granted by *Pearson* and granted defendants “qualified immunity on the ground that a purported right was not ‘clearly established’ by prior case law, without resolving the often more difficult question whether the purported right exists at all”); *al-Kidd*, 131 S. Ct. at 2080.

1333. *al-Kidd*, 131 S. Ct. at 2080.

1334. *Pearson*, 555 U.S. at 237.

1335. *Id.*

1336. *Id.* at 238.

1337. *Id.*

1338. *Id.* at 238–39.

1339. 297 U.S. 288 (1936) (Brandeis, J., concurring).

1340. *Pearson*, 555 U.S. at 241.

1341. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson v. Jones*, 515 U.S. 304, 311 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). *See also* *Ortiz v. Jordan*, 131 S. Ct. 884, 891 (2011).

The jurisdictional basis for this appeal is 28 U.S.C. § 1291, which provides that the “courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.” When the qualified immunity appeal can be decided as a matter of law, the order denying qualified immunity is considered final under the “collateral order doctrine” articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *See Mitchell*, 472 U.S. at 524–27.

1342. *Johnson*, 515 U.S. at 313. *See also Ortiz*, 131 S. Ct. at 2011.

1343. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *McKenna v. Wright*, 386 F.3d 432 (2d Cir. 2004).

1344. 516 U.S. 299 (1996).

1345. *Id.* at 306–07.

1346. *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

1347. *Behrens*, 516 U.S. at 310–11; *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995); *Yates v. City of Cleveland*, 941 F.2d 444, 448 (6th Cir. 1991); *Apostol*, 870 F.2d at 1339.

1348. *Behrens*, 516 U.S. at 310–11. The appellate court also determines whether it has jurisdiction after the district court has determined the appeal to be frivolous. *See, e.g., Dickerson v. McClellan*, 37 F.3d 251, 252 (8th Cir. 1994).

1349. 131 S. Ct. 884 (2011).

1350. *Id.* at 889.

1351. *Id.* (citing Fed. R. Civ. P. 50(a), (b)).

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1352. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

1353. *See infra* Chapter 18.

1354. *Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981).

1355. *See supra* Chapter 4, § III.E.

1356. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

1357. *Zinermon v. Burch*, 494 U.S. 113, 135–36 (1990).

1358. 557 U.S. 52 (2009).

1359. *Id.* at 71 (citation omitted). *See also Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927, 935–36 (8th Cir. 2012) (§ 1983 plaintiff who asserts right to postdeprivation process must pursue available postdeprivation remedies).

1360. *Parratt*, 451 U.S. at 544.

1361. 411 U.S. 475 (1973).

1362. 544 U.S. 74 (2005).

1363. 541 U.S. 637 (2004).

1364. *Id.* at 644. *See also* *Hill v. McDonough*, 547 U.S. 573, 580–81 (2006) (constitutional challenge to three-drug sequence used to execute by lethal injection may be brought under § 1983).

1365. In *Baze v. Rees*, 128 S. Ct. 1520 (2008), the Supreme Court held, in a declaratory judgment action, that Kentucky’s three-drug protocol for carrying out the death penalty by lethal injection did not violate the Eighth Amendment prohibition against cruel and unusual punishment.

1366. 512 U.S. 477 (1994).

1367. 541 U.S. 637 (2001).

1368. *Id.* at 647 (quoting *Heck*, 512 U.S. at 487).

1369. *See* *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) (noting that most circuit courts hold § 1983 excessive force claims do not necessarily imply invalidity of conviction for resisting arrest or peace officer or the like; also noting, however, that to extent state law “under which a conviction is obtained differs, the answer to the *Heck* question could also differ”).

1370. 131 S. Ct. 1289 (2011).

1371. 544 U.S. 74 (2005), discussed at note 1362 and accompanying text.

1372. *Skinner*, 131 S. Ct. at 1293 (quoting *Wilkinson*, 544 U.S. at 81).

1373. *Id.* at 1299. *Skinner* rejected the defendants’ argument that allowing the suit to be brought under § 1983 will lead to a proliferation of other such § 1983 suits.

In the Circuits that currently allow § 1983 claims for DNA testing, no evidence tendered by [defendant] shows any litigation flood or even rainfall. The projected toll on federal courts is all the more implausible regarding DNA testing claims, for *Osborne* has rejected substantive due process as a basis for such claims.

*Id.* (internal references omitted). Further, the Prison Litigation Reform Act “has placed a series of controls on prisoner suits, constraints designed to prevent sportive filings in federal court.” *Id.*

In dictum, the Court opined that in contrast to a “DNA access to evidence” claim, *Brady* claims are “within the traditional core of habeas corpus and outside the province of § 1983.” *Id.* at 1300 (citing *Heck v. Humphrey*, 512 U.S. 477, 479 (1994); *Amaker v. Weiner*, 179 F.3d 48, 51 (2d Cir. 1999); *Beck v. Muskagee Police Dept.*, 195 F.3d 553, 560 (10th Cir. 1999)). A *Brady* claim requires a showing that the state suppressed evidence material to guilt or punishment. “[P]arties asserting *Brady* violations postconviction generally do seek a judgment qualifying them for ‘immediate or speedier release’ from imprisonment.” *Skinner*, 131 S. Ct. at 1300 (citing *Wilkinson*, 544 U.S. at 82).

1374. 549 U.S. 384 (2007).

1375. *Id.* at 393.

1376. 520 U.S. 641 (1997).

1377. *Id.* at 646.

1378. 540 U.S. 749 (2004).

1379. *Id.* at 754–55.
1380. 523 U.S. 1 (1998).
1381. The trend is to hold the *Heck* doctrine inapplicable in these circumstances. *See* *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010); *Morrow v. Fed. Bureau of Prisons*, 610 F.3d 1271 (11th Cir. 2010); *Wilson v. Johnson*, 535 U.S. 262 (4th Cir. 2008).
1382. 457 U.S. 496 (1982).
1383. *See, e.g., Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004).
1384. 42 U.S.C. § 1997e(a) (1996).
1385. 532 U.S. 731 (2001).
1386. 534 U.S. 516 (2002).
1387. *Id.* at 532.
1388. 548 U.S. 81 (2006).
1389. *Id.* at 102. In some cases courts have held that the PLRA exhaustion requirement should not apply when the failure to exhaust was not the prisoner’s fault. For example, when a prison official’s threats toward an inmate inhibit the inmate’s ability to pursue an administrative grievance procedure, the defendant should be estopped from asserting failure to exhaust. *See, e.g., Hemphill v. New York*, 380 F.3d 680, 688–90 (2d Cir. 2004). *See also* *Turner v. Burnside*, 541 F.3d 1077, 1085–86 (11th Cir. 2008); *Ziembra v. Wezner*, 366 F.3d 161, 163–64 (2d Cir. 2003). In addition, exhaustion is not required where administrative remedies are unavailable to an inmate for various reasons beyond the prisoner’s control. *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010); *Nunez v. Duncan*, 591 F.3d 1217, 1224–26 (9th Cir. 2010); *Giano v. Goard*, 380 F.3d 670, 677 (2d Cir. 2004).
1390. *Woodford*, 548 U.S. at 101.
1391. 549 U.S. 199 (2007).
1392. *Id.* at 218.
1393. *Id.* at 219.
1394. *Id.* at 223.
1395. *Pavey v. Conley*, 544 F.3d 739, 741–42 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1620 (2009). *See also* *Messa v. Goord*, 652 F.3d 305, 309 (2d Cir. 2011) (“Matters of judicial administration often require district judges to decide factual disputes that are not bound up with the merits of the underlying dispute.”); *Drippe v. Tobelinski*, 604 F.3d 778, 782 (3d Cir. 2010) (dictum); *Dillon v. Rogers*, 596 F.3d 260, 271 (5th Cir. 2010) (judge may resolve any factual issues pertaining to exhaustion, but “when courts rule on exhaustion on the basis of evidence beyond the pleadings, the non-moving party should be granted the protections of [the] Rule 56” summary judgment procedures); *Bryan v. Rich*, 530 F.3d 1368, 1373–76 (11th Cir.), *cert. denied*, 129 S. Ct. 733 (2008).
1396. *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009); *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004); *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1212–13 (10th Cir. 2003); *McKinney v. Carey*, 311 F.3d 1198, 1200–01 (9th Cir. 2002); *Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001); *Brown v. Tombs*, 139 F.3d 1102, 1104 (6th Cir.), *cert. denied*, 523 U.S. 833 (1998). *See also* *Burrell v. Powers*, 431 F.3d 282, 285 (7th Cir. 2005); *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002).
1397. 487 U.S. 131 (1988).
1398. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

1399. 473 U.S. 172 (1985).

1400. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

1401. The Supreme Court has described this ripeness as “prudential” rather than “jurisdictional.” *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733–34 (1997).

1402. *San Remo Hotel v. San Francisco*, 545 U.S. 323, 337–38 (2005).

1403. *See Knutson v. City of Fargo*, 600 F.3d 992, 996–99 (8th Cir.) (preclusion barred plaintiffs’ takings claim), *cert. denied*, 131 S. Ct. 357 (2010); *Agripost, LLC v. Miami-Dade Cnty.*, 525 F.3d 1049, 1052 (11th Cir. 2008) (state court decision precluded § 1983 takings claim), *cert. denied*, 129 S. Ct. 1668 (2009); *Trafalgar Corp. v. Miami Bd. of Comm’rs*, 519 F.3d 285, 287–88 (6th Cir. 2008) (state court rejection of regulatory takings claim for just compensation precluded relitigation of that claim in federal court).

## Chapter 18: Preclusion Defenses, p. 169

1404. *San Remo Hotel v. San Francisco*, 545 U.S. 323, 337–38 (2005); *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 81 (1984); *Allen v. McCurry*, 449 U.S. 90, 94–95 (1980). *See also* *Haring v. Prorise*, 462 U.S. 306, 313–14 (1983).

1405. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–81 (1982); *Allen*, 449 U.S. at 95.

1406. *Allen*, 449 U.S. at 103–04.

1407. *San Remo Hotel*, 545 U.S. at 337–38. *See supra* Chapter 17, § V (Ripeness).

1408. 428 U.S. 465 (1976).

1409. *Allen*, 449 U.S. at 103–04.

1410. *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83–85 (1984).

1411. *San Remo Hotel*, 545 U.S. at 335.

1412. 478 U.S. 788 (1986).

1413. *Id.* at 799 (quoting *United States v. Utah Constr. Mining Co.*, 384 U.S. 394, 422 (1966)).

1414. 466 U.S. 284 (1984).

1415. 556 U.S. 247 (2009).

1416. *Id.* at 263.

## Chapter 19: Statute of Limitations, p. 171

1417. Because there is no federal survivorship law for § 1983 claims, § 1988(a) requires federal courts to borrow state survivorship policy, so long as the state policy is not inconsistent with the policies of § 1983. *See infra* Chapter 20. However, § 1988(a) does not allow federal courts to incorporate an entire state cause of action into the § 1983 action. *Moor v. Cnty. of Alameda*, 411 U.S. 693, 703–04 (1973) (“we do not believe that section [1988], without more, was meant to authorize the wholesale importation into federal law of state causes of action”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 701 n.66 (1978) (“42 U.S.C. § 1988 cannot be used to create a federal cause of action where § 1983 does not otherwise provide one”).

1418. 471 U.S. 261 (1985).

1419. *See Burnett v. Grattan*, 468 U.S. 42, 48–50 (1984).

1420. *Owens v. Okure*, 488 U.S. 235, 236 (1989). A state-by-state table of limitations periods in § 1983 actions is set forth in 1B Martin A. Schwartz, *Section 1983 Litigation*:

*Claims and Defenses* § 12.02[B] (4th ed. 2014). Even when a state, like Illinois, has a specific limitations period for claimed failures to protect from childhood sexual abuse, the governing § 1983 limitations period is the state’s general personal injury period. *Woods v. Ill. Dep’t of Children & Family Servs.*, 710 F.3d 762 (7th Cir. 2013) (Illinois two-year limitations period, not Illinois Childhood Sexual Abuse Act twenty-year period, governs § 1983 actions in Illinois).

1421. “Congress did not intend Rule 15(c) be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts.” *Dean v. United States*, 278 F.3d 1218, 1221 (11th Cir. 2002).

1422. Fed. R. Civ. P. 15(c)(3)(B).

1423. See Advisory Committee note to 1991 amendment to Fed. R. Civ. P. 15. See, e.g., *Hogan v. Fischer*, 738 F.3d 509 (2d Cir. 2013).

1424. 130 S. Ct. 2485 (2010).

1425. Fed. R. Civ. P. 15(c)(1)(ii)(C) (emphasis added).

1426. *Krupski*, 130 S. Ct. at 2490.

1427. *Id.* at 2493–94.

1428. *Id.* at 2494 (quoting Black’s Law Dictionary 1092 (9th ed. 2009)).

1429. *Id.*

1430. The Court in *Krupski* found that its reading of Rule 15(c)(1)(C) was consistent with Congress’s historical reason for adding that rule in 1966. Individuals filing suits pertaining to Social Security benefits often failed to name as a party defendant the party identified in the statute as the proper defendant—the current secretary of what was then the Department of Health, Education, and Welfare—and named instead the United States, or the Department of HEW, or the nonexistent “Federal Security Administration,” or a recently retired secretary. By the time these plaintiffs discovered their mistakes, the limitations period may have expired.

1431. *Garrett v. Fleming*, 362 F.3d 692, 696–97 (10th Cir. 2004); *Wayne v. Jarvis*, 197 F.3d 1098, 1102–04 (11th Cir. 1999), *cert. denied*, 529 U.S. 1115 (2000); *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir.), *cert. denied*, 519 U.S. 821 (1996); *Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 468 (2d Cir. 1995), *modified*, 74 F.3d 1366 (2d Cir. 1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256–57 (7th Cir. 1993).

1432. *But see*, e.g., *Hogan v. Fischer*, 738 F.3d 509, 518 (2d Cir. 2013) (relation back applied under “more forgiving” New York state law); *Singleton v. Pa. Dep’t of Corr.*, 266 F.3d 186, 194–95 (3d Cir. 2001) (rejecting lack-of-mistake rationale, but denying relation back because newly named official had not received notice of action within requisite time period); *see also Solivan v. Dart*, 897 F. Supp. 2d 694, 701–02 (N.D. Ill. 2012) (relying on *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485 (2010)).

1433. *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

1434. *See*, e.g., *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 3 (1st Cir. 1995); *Harris v. Hegmann*, 198 F.3d 153, 157 (5th Cir. 1999).

1435. *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991). *See also Wallace v. Kato*, 549 U.S. 384, 391 (2007) (claim accrues when wrongful act results in damages even if full extent of damages is not then known or predictable); *United States v. Kubrick*, 444 U.S.

111, 121–22 (1979) (non-§ 1983) (patient’s medical malpractice claim accrued when he was “aware of his injury and its cause”; accrual should not be further delayed until plaintiff learns of his legal rights regarding claim).

1436. 549 U.S. 384 (2007).

1437. *Id.* at 388 (quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997), in turn quoting Rawlings v. Ray, 312 U.S. 96, 98 (1941)).

1438. *See, e.g.*, Bishop v. Children’s Ctr. for Developmental Enrichment, 618 F.3d 533 (6th Cir. 2010); Cao v. Puerto Rico, 525 F.3d 112 (1st Cir. 2008) (§ 1983 claim accrues when plaintiff knew or should have known of her injury); Edison v. Tenn. Dep’t of Children’s Servs., 510 F.3d 631 (6th Cir. 2007).

1439. 512 U.S. 477 (1994). *See supra* Chapter 17, § II.

1440. *Id.* at 489–90.

1441. Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991); Gerstein v. Pugh, 420 U.S. 103 (1975).

1442. *Wallace*, 549 U.S. at 391–92.

1443. *Id.* at 388 (emphasis added).

1444. *Id.* (emphasis added).

1445. *Id.* at 389.

1446. *Id.*

1447. *Id.* at 391. The Court did not decide the damages issue.

1448. *Id.* at 390. The Court did not resolve whether this damages principle governs damages for a § 1983 false arrest claim. Because Wallace did not assert a § 1983 malicious prosecution claim, the Court did not analyze whether such a claim would have been cognizable.

1449. *Wallace*, 549 U.S. at 393. The Court said that if a § 1983 Fourth Amendment false arrest claim is filed during the pendency of the criminal prosecution, which may be necessary to comply with the § 1983 limitations period, the federal court may stay the § 1983 action under one of the abstention doctrines. “If the plaintiff is ultimately convicted, and if the stayed suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.” *Wallace*, 549 U.S. at 393–94 (citations omitted).

1450. *See generally* 1B Schwartz, *supra* note 1420, § 12.039[B], pp. 12–42.

1451. Chardon v. Fernandez, 454 U.S. 6, 8 (1981).

1452. *See, e.g.*, Pike v. City of Mission, 731 F.2d 655, 660 (10th Cir. 1984) (en banc) (holding “a plaintiff may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continues to be felt”).

1453. 536 U.S. 101 (2002).

1454. *See, e.g.*, Hildebrandt v. Ill. Dep’t of Natural Res., 347 F.3d 1014, 1036 n.18 (7th Cir. 2003); Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara, 344 F.3d 822, 828–29 (9th Cir. 2003).

1455. 549 U.S. 384 (2007).

1456. *Id.* at 394 (citing Hardin v. Straub, 490 U.S. 536, 538–39 (1989); Bd. of Regents of Univ. of N.Y. v. Tomanio, 446 U.S. 478, 484–86 (1980)). A federal court will not borrow



a state tolling rule if it is inconsistent with the policies of § 1983. *See* 1B Schwartz, *supra* note 1420, § 12.05. When an issue of state tolling law is unclear, a federal court may, in accordance with a state certification procedure, certify the issue to the highest court in the state. *See* Garza v. Burnett, 672 F.3d 1217, 1221–22 (10th Cir. 2012) (court certified unclear question of Utah equitable tolling law to Utah Supreme Court).

1457. It is important to not confuse equitable tolling with equitable estoppel. “[E]quitable tolling applies when the plaintiff is unaware of his cause of action, while equitable estoppel applies when a plaintiff who knows of his cause of action reasonably relies on the defendant’s statements or conduct in failing to bring suit.” *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 814 (9th Cir. 2011) (citation omitted).

1458. *Wallace*, 549 U.S. at 396.

## Chapter 20: Survivorship and Wrongful Death, p. 177

1459. 436 U.S. 584 (1978).

1460. *Id.* at 590. When applying state survival law, a federal court must analogize the § 1983 claim to the most analogous state law claims. *Benz v. City of Kendallville*, 577 F.3d 776, 779 (7th Cir. 2009).

1461. *Robertson*, 436 U.S. at 591.

1462. *Id.* at 591–93. *See, e.g.*, *Banks v. Yokemick*, 177 F. Supp. 2d 239, 249–50 (S.D.N.Y. 2001) (New York survivorship law, which denies recovery for loss of enjoyment of life, is inconsistent with § 1983 policies of compensation and deterrence).

1463. *Robertson*, 436 U.S. at 591–93. In *Estate of Gilliam v. City of Prattville*, 639 F.3d 1041 (11th Cir. 2011), the court held that Alabama survivorship law, under which unfiled personal injury claims do not survive the death of an injured party, is not inconsistent with the policies of § 1983. There was no evidence that defendant-officers’ use of force caused decedent’s death, and Alabama law applied uniformly and did not target § 1983 claims.

In the vast majority of cases, applying Alabama law through § 1988(a) will compensate the constitutionally injured and impose liability on those state officials who violate the Constitution. First, when an injured party actually files a § 1983 action and later dies, that action will survive death. . . . Second, when a constitutional violation actually causes the injured party’s death, a § 1983 claim can be asserted through the Alabama wrongful death statute. . . .

*Id.* at 1047.

1464. *Robertson*, 436 U.S. at 594. *See, e.g.*, *Chaudhry v. City of L.A.*, 751 F.3d 1096, 1103–05 (9th Cir. 2014) (California law denying recovery for decedent’s pre-death pain and suffering inconsistent with § 1983’s deterrence policies).

1465. *See, e.g.*, *Carringer v. Rodgers*, 331 F.3d 844, 850 n.9 (11th Cir. 2003) (“right to wrongful death recovery under § 1983 has generated considerable debate amongst our sister circuits”).

1466. *See, e.g.*, *Brazier v. Cherry*, 293 F.2d 401, 404–06 (5th Cir. 1961).

1467. *See, e.g.*, *Trujillo v. Bd. of Cnty. Comm’rs*, 768 F.2d 1186, 1189–90 (10th Cir. 1985).

1468. *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 Ind. L.J. 559 (1985). The various § 1983 wrongful death theories are discussed in 1B Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* §§ 13.03–13.07 (4th ed. 2014).

1469. 28 U.S.C. § 1367. *See supra* Chapter 1.

## Chapter 21: Abstention Doctrines, p. 178

1470. *See, e.g., Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

1471. *Colorado River*, 424 U.S. at 813.

1472. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

1473. *Younger v. Harris*, 401 U.S. 37 (1971).

1474. *Colorado River*, 424 U.S. 800.

1475. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

1476. 28 U.S.C. § 1341 (2006).

1477. 312 U.S. 496 (1941).

1478. *Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975) (interpreting *Pullman*). *See, e.g., Casiano-Montanez v. State Ins. Fund Corp.*, 707 F.3d 124 (1st Cir. 2013).

1479. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 512 (1972).

1480. 520 U.S. 43 (1997).

1481. *Id.* at 75–76.

1482. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415–16 (1964).

1483. *Id.* at 421–22.

1484. 375 U.S. 411 (1964).

1485. *Id.* at 417.

1486. *Id.* at 421–22.

1487. *Id.* at 419. If a party elects to forgo the right to return to federal court, the Supreme Court has held that, even in § 1983 cases, the sole fact that the state court's decision may have been erroneous will not be sufficient to lift the preclusion bar to relitigation of federal issues decided after a full and fair hearing in state court. *Allen v. McCurry*, 449 U.S. 90, 101 (1980).

1488. *Harrison v. NAACP*, 360 U.S. 167, 177 (1959).

1489. 401 U.S. 37 (1971).

1490. *Id. See also Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (federal court may not interfere with enforcement of state civil judgment); *Moore v. Sims*, 442 U.S. 415 (1979) (child abuse proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (attachment of welfare benefits allegedly obtained by fraud); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (quasi-criminal nuisance proceeding to enjoin allegedly obscene movie).

*Removed Actions:* The mere fact that a state suit was removed to federal court does not justify *Younger* abstention. *Vill. of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 783 (7th Cir. 2008).

1491. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

1492. 401 U.S. 66 (1971).

1493. *Id.* at 73. In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Court addressed the issue of the availability of declaratory relief when no state criminal prosecution is pending. Noting that the relevant principles of equity, comity, and federalism carry little force in the absence of a pending state proceeding, the Court held that “federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a gen-

uine threat of enforcement of a disputed state criminal statute.” *Steffel*, 415 U.S. at 475. The genuine threat of enforcement would give the plaintiff standing to seek prospective relief. See *supra* Chapter 2. The Court’s decision in *Steffel*, however, must be read in conjunction with its subsequent decision in *Hicks v. Miranda*, 422 U.S. 332 (1975), holding that where state criminal proceedings are commenced against a federal plaintiff after the federal complaint has been filed, but “before any proceedings of substance on the merits have taken place in the federal court,” the *Younger* doctrine applies “in full force.” *Hicks*, 422 U.S. at 349.

The Court has held that the granting of preliminary injunctive relief (see *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927–28 (1975)) or permanent injunctive relief (see *Wooley v. Maynard*, 430 U.S. 705, 709–10 (1977)) is not necessarily barred by *Younger* principles when no criminal proceeding is pending.

1494. 484 U.S. 193 (1988).

1495. *Id.* at 202. *Accord* *Gakuba v. O’Brien*, 711 F.3d 751, 753 (7th Cir. 2013).

1496. See *Wallace v. Kato*, 549 U.S. 384, 393–94 (2007). See also *Heck v. Humphrey*, 512 U.S. 477 (1994). “[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings” (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)). *Heck*, 512 U.S. at 487 n.8. *Heck* held that when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* at 486–87. See *supra* Chapter 17. The *Heck* doctrine does not pertain to pending criminal prosecutions, but to criminal prosecutions that culminated in a conviction.

1497. 420 U.S. 592 (1975).

1498. *Id.* at 604. In *Moore v. Sims*, 442 U.S. 415, 423 (1979), the Court treated the case as governed by *Huffman* because the state was a party to the state proceedings in question, and the temporary removal of a child in a child abuse context was in aid of and closely related to enforcement of criminal statutes.

1499. *Huffman*, 420 U.S. at 607. In *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977), the Court held that the principles of *Younger* and *Huffman* were broad enough to apply to interference by a federal court with ongoing civil proceedings to attach welfare benefits allegedly obtained by fraud “brought by the State in its sovereign capacity” to vindicate important state interest in preventing welfare fraud. *Id.* at 444. See also *Moore*, 442 U.S. 415 (state has important state interest in child abuse proceedings); *Juidice v. Vail*, 430 U.S. 327, 335 (1977) (holding principles of “comity” and “federalism” applied to case where state was not party, but where state’s judicial contempt process was involved, and its interest in contempt process is of “sufficiently great import to require application of the principles of *Younger*”); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 5–10, 13–14 & n.12 (1987) (reversing lower court’s granting of federal court injunction against state court requirement that Texaco post bond in excess of \$13 billion to prevent execution of judgment against it while appeal was pursued; holding *Younger* rationale applied to this civil proceeding, observing state’s interest in protecting “the authority of the judicial system, so that its orders and judgments are not rendered nugatory”). Cf. *New Orleans Pub. Serv., Inc. v. Council of New*

Orleans, 491 U.S. 350, 368 (1989) (holding *Younger* abstention does not apply to state judicial proceedings “reviewing legislative or executive action”).

1500. 457 U.S. 423 (1982). In *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013), the Supreme Court stated that *Younger* abstention is limited to (1) ongoing criminal prosecutions, (2) civil enforcement proceedings, and (3) civil proceedings in furtherance of the state courts’ ability to perform their judicial functions. The Court held that *Younger* did not apply to administrative proceedings invoked by a private party to settle a dispute with another private party.

1501. *Middlesex Cnty.*, 457 U.S. at 432.

1502. 477 U.S. 619 (1986).

1503. In *Ohio Civil Rights*, the Court emphasized that the application of *Younger* to pending administrative proceedings is fully consistent with the rule that litigants need not exhaust administrative remedies before they can bring a § 1983 suit in federal court (see *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982)), because “the administrative proceedings here are coercive rather than remedial[;] began before any substantial advancement in the federal action took place[;] and involve an important state interest.” *Ohio Civil Rights*, 477 U.S. at 627–28 n.2. See also *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 518–23 (1st Cir. 2009) (*Younger-Dayton* abstention inapplicable because, inter alia, administrative proceedings were remedial proceedings initiated by federal plaintiffs, not coercive proceedings initiated by state); *Brown v. Day*, 555 F.3d 882, 890–93 (10th Cir. 2009) (same); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 260 (1st Cir. 1987) (*Younger-Dayton* abstention inapplicable because administrative proceeding initiated by federal court plaintiff was remedial rather than coercive).

1504. 134 S. Ct. 584 (2013).

1505. *Id.* at 588, 591.

1506. *Id.* at 593.

1507. The Court, in *Sprint Communications*, said that while in *Dayton Christian Schools* it referenced a distinction between “coercive” and “remedial” state proceedings, it did not find this “inquiry necessary or inevitably helpful, given the susceptibility of the designations to manipulation.” *Sprint Commc’ns*, 134 S. Ct. at 593 n.6.

1508. *Id.* at 588. See also *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127 (3d Cir. 2014) (applying *Sprint Commc’ns*).

1509. See, e.g., *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

1510. “A federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.” *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 14–15 (1987). Therefore, the federal plaintiff bears the burden of showing that state procedural law barred presentation of her constitutional claim. *Id.* at 14; *Moore v. Sims*, 442 U.S. 415, 432 (1979) (plaintiffs failed to show that state procedural law barred presentation of their claims); *Nivens v. Gilchrist*, 444 F.3d 237, 243 (4th Cir. 2006) (critical issue is whether state law allows federal court plaintiff to raise her federal claim in state court, not whether state court agrees with claim); 31 *Foster Children v. Bush*, 329 F.3d 1255, 1279 (11th Cir. 2003). See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973)

(*Younger* abstention inapplicable because state board was incompetent by reason of bias to adjudicate issues before it).

Another exception recognized by the Supreme Court, but very rarely invoked, is a case in which the contested state statute is “flagrantly and patently violative of express constitutional provisions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort was made to apply it.” *Younger*, 401 U.S. at 53–54 (quoting *Watson v. Buck*, 313 U.S. 389, 402 (1941)).

1511. 424 U.S. 800 (1976).

1512. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

1513. *Id.* at 26.

1514. *Colorado River*, 424 U.S. at 806.

1515. *Id.* at 813–17.

1516. *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

1517. *Id.* (citing *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

“*Claim Splitting*”: The Second Circuit held that the district court erred in invoking the doctrine against “claim splitting” to dismiss the § 1983 suit because of the pendency of state court proceedings raising state law claims arising out of the same transactions as the federal suit. Whether dismissal is proper in these circumstances depends on the application of *Colorado River* abstention. *Kanciper v. Suffolk Cnty. SPCA*, 722 F.3d 88, 93 (2d Cir. 2013).

1518. *Colorado River*, 424 U.S. at 818.

1519. *Id.* (noting that no one factor is determinative and “only the clearest of justifications will warrant dismissal”).

1520. 460 U.S. 1 (1983). The case involved parallel state and federal proceedings addressing the issue of whether a contract between the parties was subject to arbitration.

1521. *Id.* at 25–26.

1522. *Id.* at 23.

1523. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 n.21 (1983). To safeguard against the running of the statute of limitations should the state litigation leave some issues unresolved, the preferable course would be to stay, rather than dismiss, the federal action.

1524. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 n.2 (1995).

1525. *San Carlos Apache Tribe*, 463 U.S. at 560.

1526. 515 U.S. 277 (1995).

1527. *Id.* at 281. The Court in *Wilton* found that the discretionary standard announced in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), was not supplanted by the “exceptional circumstances” test of *Colorado River* and *Moses H. Cone*. *Wilton*, 515 U.S. at 282–87. *Brillhart*, like *Wilton*, involved an insurer seeking a federal declaratory judgment of nonliability in the face of a state court coercive suit seeking coverage under the policy. *Wilton*, 515 U.S. at 282.

1528. *Moses H. Cone*, 460 U.S. at 10.

1529. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988).

1530. 319 U.S. 315 (1943).

1531. *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989).

1532. *Burford*, 319 U.S. at 316–17.

1533. *Id.* at 324–26.

1534. *Id.* at 332.

1535. *Id.* at 334. The Sixth Circuit held that *Burford* abstention applies only when the case implicated state policies, not local policies. *Saginaw Hous. Comm’n v. Bannum, Inc.*, 576 F.3d 620, 628 (6th Cir. 2009) (disagreeing with *Pomponio v. Fauquier Cnty. Bd. of Supervisors*, 21 F.3d 1319 (4th Cir. 1992)).

1536. *Burford*, 319 U.S. at 333–34.

1537. 491 U.S. 350 (1989). *NOPSI* involved a refusal by the New Orleans City Council to allow NOPSI to get a rate increase to cover additional costs that had been allocated to it, along with other utility companies, by the Federal Energy Regulatory Commission for the Grand Gulf nuclear reactor.

1538. *Id.* at 362.

1539. *Id.*

1540. *Id.* at 361 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

*First Amendment Claims:* A federal district court observed a “developing consensus among federal courts that *Burford* abstention is unwarranted where . . . plaintiffs bring First Amendment challenges to state laws or actions.” *NAGE v. Mulligan*, 849 F. Supp. 2d 167, 175 (D. Mass. 2012) (citing courts of appeals cases).

1541. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996).

1542. *Id.* at 730. Given the facts of the case before it, the Court in *Quackenbush* found it unnecessary to decide “whether a more limited abstention-based stay order would have been” appropriate. *Id.* at 731.

1543. *See generally* *Akenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

1544. *See* *Troxel v. Granville*, 530 U.S. 57 (2000); *Clark v. Jeter*, 486 U.S. 456 (1988); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981); *Little v. Streater*, 452 U.S. 1 (1981); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Stanley v. Illinois*, 405 U.S. 645 (1972). Given these decisions, it is hard to conclude that the domestic relations doctrine extends to all federal questions arising in the family law area. *See* *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984). The Supreme Court’s decision in *Lehman v. Lycoming County Children’s Services Agency*, 458 U.S. 502 (1982), that federal habeas corpus is not available to contest the involuntary termination of parental rights, is based on the fact that Congress did not intend that the federal habeas corpus statutes encompass child custody cases.

1545. 28 U.S.C. § 1341 (1996). *See* *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (Tax Injunction Act applies to federal court suit for declaratory judgment that state tax policy is unconstitutional); *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) (policies of § 1341 pertain to § 1983 claims for damages); *Rosewell v. La Salle Nat’l Bank*, 450 U.S. 503 (1981). *See also* *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582 (1995) (policies of Tax Injunction Act pertain to state court § 1983 actions).

against state tax, and require state courts to refrain from granting prospective relief under § 1983 when there is adequate state legal remedy).

1546. *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998) (citations omitted).

1547. 542 U.S. 88 (2004).

1548. 130 S. Ct. 2323 (2010).

1549. *Id.* at 2330.

1550. *Id.* at 2336.

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1551. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

1552. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969).

1553. *See also Hendrick v. Cooper*, 589 F.3d 887, 893 (7th Cir. 2009) (In prisoner excessive force case, jury was instructed that compensatory damages can cover “pain and suffering, inconvenience, mental anguish, shock and discomfort, and loss of enjoyment of life,” that “[n]o evidence of the dollar value of physical or mental emotional pain and suffering . . . needs to be introduced,” and that “[t]here is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the plaintiff for the injury he has sustained.”).

1554. 435 U.S. 247 (1978) (procedural due process claim).

1555. 477 U.S. 299 (1986) (First Amendment claim).

1556. *Stachura*, 477 U.S. at 308 n.11; *Carey*, 435 U.S. at 267. *See also Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (“[O]ne dollar is recognized as an appropriate value for nominal damages.”). The Seventh Circuit held that nominal damages may be awarded even in a § 1983 excessive force case. *Briggs v. Marshall*, 93 F.3d 355, 359–60 (7th Cir. 1996). *Accord Frizzell v. Szabo*, 647 F.3d 698, 701–02 (7th Cir. 2011). A properly pleaded claim for nominal damages may avoid dismissal for mootness. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 3503 (2010); *Dean v. Blumenthal*, 577 F.3d 60, 66 (2d Cir. 2009). *Cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997) (claim for nominal damages against state official in official capacity did not save case from mootness because § 1983 creates no remedy against a state).

1557. *Carey*, 435 U.S. at 264.

1558. *Id.* at 267.

1559. *Id.* at 254.

1560. *Id.* at 263–64 (mental and emotional distress actually caused by denial of procedural due process is compensable under § 1983).

1561. *Stachura*, 477 U.S. at 310.

1562. *Id.* at 310 n.13.

1563. *Id.* at 311 & 312 n.14.

1564. *Id.* at 310–11. In fact, it appears that presumed damages have rarely been awarded in § 1983 actions.

1565. *Roe v. Elyea*, 631 F.3d 843, 864 (7th Cir. 2011) (citing *Harris v. Kuba*, 486 F.3d 1010, 1014 (7th Cir. 2007)).

1566. *See Burke v. McDonald*, 572 F.3d 51, 60 (1st Cir. 2009) (Holding, in a § 1983 action, that the district court properly instructed the jury on compensatory damages “as



a matter of proximate cause. This approach to the issue is consistent with Supreme Court precedent emphasizing that liability under § 1983 flows against the defendant for all damages that are the ‘natural consequences of his actions.’” [Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961))] .... “The district court’s instructions ... properly and clearly explained the concept of proximate causation....”).

1567. Cobige v. City of Chi., 651 F.3d 780, 782 (7th Cir. 2011) (citations omitted).

1568. Bender v. City of N.Y., 78 F.3d 787, 793–94 (2d Cir. 1996); Lewis v. Kendrick, 944 F.2d 949, 954 (1st Cir. 1991); Gilmore v. City of Atlanta, 864 F.2d 734, 740–41 (11th Cir.), *cert. denied*, 493 U.S. 817 (1989).

1569. 4 Martin A. Schwartz, Section 1983 Litigation: Jury Instructions, Instruction 18.05.3 (2d ed. 2014) (adapted from *Bender v. City of N.Y.*, 78 F.3d 787, 794 n.5 (2d Cir. 1996) (Newman, J.)). *See, e.g.*, Thomas v. Cook Cnty. Sheriff’s Dep’t, 604 F.3d 293, 313 (7th Cir.) (instructions should clearly inform jury “not to duplicate damages”), *cert. denied*, 131 S. Ct. 643 (2010); Fox v. Hayes, 600 F.3d 819 (7th Cir. 2010) (ruling district court did not err in failing to instruct jury that it is impermissible to award duplicative damages; no evidence of duplicative damages for false arrest and malicious prosecution).

The jury was instructed on the legal distinctions between the two claims. It assessed damages against all five defendants on the false arrest claim, but only against [two defendants] on the malicious prosecution claim. That verdict demonstrates that the jury understood that separate conduct and harms correspond to the distinct claims. Accordingly, the defendants have not demonstrated that they were prejudiced by the district court’s decision not to give their proposed duplication damages instruction.

*Fox*, 600 F.3d at 843 (citation omitted). *See also* Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508 (1st Cir. 2009) (plaintiff’s First Amendment retaliation and Equal Protection claims did not overlap; assuming arguendo that they did overlap, jury’s award of damages did not violate rule against double recovery because verdict form called for one damages award on all of plaintiffs’ constitutional claims; district court instructed jury to compensate plaintiff’s injuries just once).

Specifically, the court instructed the jurors that they “must arrive at a sum of money that will justly, fairly and adequately compensate the plaintiffs for the actual pain, suffering and emotional distress [it] find[s] that they endured as a direct result of any constitutional deprivation, defamation, invasion of privacy or negligence.” It further explained that “[t]he damages that [it] award[s] must be fair compensation for all the plaintiffs damages, no more or no less.” Thus, even if the jury found that the same unlawful conduct and injury supported two theories of liability, there is no basis for assuming that the jury believed it was required to award plaintiffs a separate amount of damages for each claim.

*Guillemard-Ginorio*, 585 F.3d at 532–35. *See also* Button v. Maloney, 196 F.3d 24, 32–33 (1st Cir. 1999) (describing different ways district courts could handle double recovery problem).

1570. *See, e.g.*, Miller v. Lovett, 879 F.2d 1066, 1070–71 (2d Cir. 1989).

1571. McClure v. Indep. Sch. Dist. No. 16, 228 F.3d 1205, 1214 (10th Cir. 2000).

1572. Hill v. City of Pontotoc, 993 F.2d 422, 426–27 (5th Cir. 1993).

1573. 461 U.S. 30 (1983).



1574. Punitive damages may also be based on “oppressive” conduct when the defendant misused authority or exploited the plaintiff’s weakness. *Dang v. Cross*, 422 F.3d 800, 809–11 (9th Cir. 2005).

*Right to Jury Trial*: The Seventh Amendment guarantees the right to a jury trial on a claim for punitive damages. *Jones v. UPS, Inc.*, 674 F.3d 1187, 1202–06 (10th Cir.) (non-§ 1983), *cert. denied*, 133 S. Ct. 413 (2012).

1575. *Powell v. Alexander*, 391 F.3d 1, 19 (1st Cir. 2004).

1576. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538–39 (1999).

1577. *See, e.g., Cortes-Reyes v. Salas-Quintana*, 608 F.3d 41, 53 (1st Cir. 2010) (upholding jury award of punitive damages even though district court awarded only nominal damages; noting, “jury may properly award punitive damages even if it awards no nominal or compensatory damages”); *Campus-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir. 1999) (“[A]s a matter of federal law, a punitive damage award which responds to a finding of a constitutional breach may endure even though unaccompanied by an award of compensatory damages.” (footnote and citations omitted)); *King v. Macri*, 993 F.2d 294, 297–98 (2d Cir. 1993) (citing cases). *See also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2622 (2008) (non-§ 1983).

1578. *See Cameron v. City of N.Y.*, 598 F.3d 50, 69 (2d Cir. 2010) (holding district court erred in not instructing jury on punitive damages; district court should instruct jury on punitive damages when plaintiff introduces some evidence defendant acted with notice or callous indifference).

1579. *Schaub v. Von Wald*, 638 F.3d 905, 926 (8th Cir. 2011); *Tapalian v. Tusino*, 377 F.3d 1, 8 (1st Cir. 2004); *Mason v. Okla. Tpk. Auth.*, 182 F.3d 1212, 1214 (10th Cir. 1999); *King v. Macri*, 993 F.2d 294, 298 (2d Cir. 1993); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978). *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (noting that it is “well settled” that defendant’s net worth is factor typically considered in assessing punitive damages); *Acevedo-Luis v. Pagan*, 478 F.3d 35, 39 (1st Cir. 2007) (proper to instruct jury “it could consider the defendant’s financial worth in assessing punitive damages”).

1580. *Alexander v. City of Milwaukee*, 474 F.3d 437, 454–55 (7th Cir. 2007).

1581. 453 U.S. 247 (1981).

1582. *See supra* Chapter 13.

1583. *See supra* Chapter 6.

1584. *See Payne v. Jones*, 711 F.3d 85, 96 (2d Cir. 2013).

1585. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

1586. *Mercado-Berrios v. Cancel-Alegria*, 611 F.3d 18, 30 (1st Cir. 2010). Nevertheless, in *Mercado-Berrios* the court evaluated the punitive damages award solely under common law standards, and found it excessive even under those standards. *See also Payne*, 711 F.3d at 96–97.

1587. *Campbell*, 538 U.S. at 416; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

1588. *Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 562. These three factors may also be considered under common-law review to determine whether an award of punitive damages is so high as to shock the judicial conscience. *Payne v. Jones*, 711 F.3d 85, 96–97 (2d Cir. 2013).

1589. *Campbell*, 538 U.S. at 425.

1590. *Id.* at 419 (quoting *Gore*, 517 U.S. at 582).

1591. 549 U.S. 346 (2007).

1592. *Id.* at 355.

1593. *Id.* at 379–80.

1594. *See, e.g., Tapalian*, 377 F.3d at 8–9; *Williams v. Kaufman Cnty.*, 352 F.3d 994, 1016 (5th Cir. 2003); *DiSorbo v. Hoy*, 343 F.3d 172, 186 (2d Cir. 2003); *Bogle v. McClure*, 332 F.3d 1347, 1360 (11th Cir. 2003); *Lee v. Edwards*, 101 F.3d 805, 808–09 (2d Cir. 1996); *Morgan v. Woessner*, 997 F.2d 1244, 1256–57 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994).

1595. 1B Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses, § 16.16[B] (4th ed 2014).

1596. 480 U.S. 386 (1985).

1597. *See* discussion in 1B Schwartz, *supra* note 1595, § 16.17.

1598. *See, e.g., Allen v. City of L.A.*, 92 F.3d 842, 845–46 (9th Cir. 1996).

1599. *See, e.g., Graham v. Sauk Prairie Police Comm’n*, 915 F.2d 1085 (7th Cir. 1990).

1600. Fed. R. Evid. 408. *See, e.g., Larez v. Holcomb*, 16 F.3d 1513 (9th Cir. 1994).

1601. *See* Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify for Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209 (2001).

1602. 42 U.S.C. § 1997e(e) (2006). *See, e.g., Al-Amin v. Smith*, 637 F.3d 1192, 1199 n.9 (11th Cir. 2011) (noting circuit split on issue, holding PLRA physical injury requirement, 42 U.S.C. § 1997e(e), not limited to compensatory damages and applies also to punitive damages) (following *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc)); *Hutchins v. McDaniels*, 512 F.3d 193, 195–98 (5th Cir. 2007) (PLRA physical injury requirement pertains to all constitutional rights, but not to nominal or punitive damages); *Zehner v. Trigg*, 133 F.3d 459, 464 (7th Cir. 1997) (upholding constitutionality of provision).

1603. 42 U.S.C. § 1997e(a) (2006). *See supra* Chapter 17.

1604. 42 U.S.C. § 1997e(d)(1)–(4) (2006). *See* 2 Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Statutory Attorney’s Fees Ch. 1 (4th ed. 2014).

1605. 18 U.S.C. § 3626(a)(2) (2006).

1606. *Id.* § 3626(b)(2). *See* 1B Schwartz, *supra* note 1595, § 16.03[D].

1607. 131 S. Ct. 1910 (2011).

1608. *Id.* at 1923.

1609. *Id.* at 1936.

1610. *Id.* at 1944.

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1611. *See generally* Awarding Attorneys’ Fees and Managing Fee Litigation (Federal Judicial Center 2d ed. 2005).

1612. 42 U.S.C. § 1988(b).

1613. *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1677 (2010). *See also* *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (prevailing plaintiff in civil rights cases serves as “‘private attorney general’”) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

1614. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980). *See also* *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (“Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney’s fees for civil-rights plaintiffs.”).

1615. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *Accord Fox*, 131 S. Ct. at 2216; *Webb v. Cnty. Bd. of Educ.*, 471 U.S. 234, 244 n.20 (1985); *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984).

1616. *Doe v. Ward*, 282 F. Supp. 2d 323, 329 n.4 (W.D. Pa. 2003) (principle that fees should not result in major litigation “is one of the emptiest phrases in our jurisprudence” because “fee questions most definitely constitute major litigation”).

1617. *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988). *See also Divane v. Krull Elec. Co.*, 319 F.3d 307, 314 (7th Cir. 2003) (ERISA suit).

1618. *Sys. Mgmt., Inc. v. Loisel*, 154 F. Supp. 2d 195, 207 (D. Mass. 2001) (Young, C.J.).

1619. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted).

1620. *Jenkins v. Missouri*, 127 F.3d 709, 713–14 (8th Cir. 1997).

1621. *See, e.g., Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001) (awards to prevailing § 1983 plaintiffs are “virtually obligatory”).

1622. *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012).

1623. *Aware Woman Clinic, Inc. v. Cocoa Beach*, 629 F.2d 1146, 1149–50 (5th Cir. 1980).

1624. *See, e.g., Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1301 (1st Cir. 1997).

1625. *See, e.g., Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983).

1626. *See Hall v. Borough of Roselle*, 747 F.2d 838, 841–42 (3d Cir. 1984); *Jordan v. U.S. Dep’t of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982); *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980).

1627. *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011); *Hughes v. Rowe*, 449 U.S. 5, 15 (1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). *See also Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (11th Cir. 1985) (no “hard and fast rules” for determining whether plaintiff’s claim was frivolous—courts may consider whether plaintiff established prima facie case; whether defendant offered to settle; and whether district court dismissed case before trial or after trial on merits).

1628. *Houston v. Norton*, 215 F.3d 1172, 1174–75 (10th Cir. 2000).

1629. *Dehertoghen v. City of Hemet*, 159 F. App’x 775, 776 (9th Cir. 2005); *Patton v. Cnty. of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988).

1630. *Fox*, 131 S. Ct. 2205.

1631. *Id.* at 2216.

1632. *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

1633. *Hewitt v. Helms*, 482 U.S. 755, 763 (1987).

1634. *Hanrahan v. Hampton*, 446 U.S. 754, 757–59 (1980).

1635. *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992). *Accord Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012) (per curiam) (permanent injunction rendered plaintiff prevailing party).

1636. *Farrar*, 506 U.S. at 112–15.

1637. *Id.* at 120–25 (O’Connor, J., concurring).

1638. *See, e.g., Aponte v. City of Chi.*, 728 F.3d 724, 727–28 (7th Cir. 2013); *Gray v. Bostic*, 720 F.3d 887, 893–99 (11th Cir. 2013); *Zinna v. Congrove*, 680 F.3d 1236, 1239 (10th Cir. 2012); *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1059–60 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 898 (2011); *Jama v. Esmor Corr. Servs.*, 577 F.3d 169, 175–76 (3d Cir. 2009); *Lippoldt v. Cole*, 468 F.3d 1204, 1222 (10th Cir. 2006); *Mercer v. Duke Univ.*, 401 F.3d 199, 203–04

(4th Cir. 2005); *Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997); *Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994).

The Seventh Circuit held that “*Farrar* can apply . . . where the plaintiff received a monetary award that is more than a nominal \$1 but ‘minimal’ relative to the amount sought.” *Aponte v. City of Chi.*, 728 F.3d 724, 727–28 (7th Cir. 2013) (citations omitted).

1639. *Maheer v. Gagne*, 448 U.S. 122, 127 (1980); *Milwe v. Cavuoto*, 653 F.2d 80, 84 (2d Cir. 1981).

1640. *See, e.g., United States v. Washington*, 813 F.2d 1020, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988); *Reel v. Ark. Dep’t of Corr.*, 672 F.2d 693, 697–98 (8th Cir. 1982) (plaintiff prevailed on state tort claims, but district court rejected plaintiff’s § 1983 claims as “insubstantial”).

1641. *See* 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Statutory Attorney’s Fees* § 2.08[B] (4th ed. 2014). *See, e.g., Vill. of Maineville v. Hamilton Twp. Bd. of Trs.*, 726 F.3d 762 (6th Cir. 2013); *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981).

1642. 461 U.S. 424 (1983).

1643. *Id.* at 436. *Accord Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

1644. “[W]ork on an unsuccessful claim [based on different facts and different legal theories] cannot be deemed to have been ‘expended in pursuit of the ultimate result achieved.’ The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.” *Hensley*, 461 U.S. at 435 (citation omitted).

1645. *Id.* at 440.

1646. 532 U.S. 598 (2001).

1647. *Id.* at 604. An accepted offer of judgment pursuant to Fed. R. Civ. P. 68 qualifies the plaintiff as a prevailing party. *Grissom v. The Mills Corp.*, 549 F.3d 313 (4th Cir. 2008); *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc.*, 298 F.3d 1238 (11th Cir. 2002); *Walsh v. Boston Univ.*, 661 F. Supp. 2d 91 (D. Mass. 2009).

1648. *Buckhannon*, 532 U.S. at 604 n.7.

1649. *See Palmetto Props., Inc. v. Cnty. of DuPage*, 375 F.3d 542, 547 (7th Cir. 2004); *N.Y. State Fed’n of Taxi Drivers, Inc. v. Westchester Cnty. Taxi & Limousine Comm’n*, 272 F.3d 154, 158 (2d Cir. 2001).

1650. *See, e.g., Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715–18 (9th Cir. 2013) (preliminary injunction based on probability of success on merits established plaintiff prevailing party); *Sole v. Wyner*, 551 U.S. 74, 84–86 (2007) (preliminary injunction did not qualify plaintiff as prevailing party because final decision on merits was in favor of defendant); *Coates v. Powell*, 639 F.3d 471, 474–75 (8th Cir.), *cert. denied*, 132 S. Ct. 412 (2011); (defendants’ written offer to settle case for \$450,000 accepted by plaintiff by email on eve of trial, which was not incorporated into judicial order, did not qualify plaintiff as prevailing party because there was no “judicial imprimatur” of settlement); *Hutchinson v. Patrick*, 636 F.3d 1, 8–11 (1st Cir. 2011) (ADA) (class action settlement approved by district court, and district court’s retention of jurisdiction of case qualified plaintiffs as prevailing plaintiffs); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089–90 (9th Cir. 2010) (settlement over which district court retained jurisdiction qualified plaintiff as prevailing party); *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 451–52 (9th Cir. 2010)

(same); *Walker v. Calumet City*, 565 F.3d 1031, 1034–37 (7th Cir. 2009) (order of dismissal entered after city represented it would not enforce contested ordinance did not render plaintiff prevailing party because under was not substantially equivalent to current decree) (relying on *T.O. v. LaGrange S.D.* No. 1, 349 F.3d 469, 478 (7th Cir. 2003)); *Roberson v. Giuliani*, 346 F.3d 75, 84 (2d Cir. 2003) (stipulation and order of discontinuance acknowledging parties' settlement agreement and providing for retention of district court jurisdiction over settlement agreement for enforcement purposes carried "sufficient judicial sanction" to render plaintiffs prevailing parties); *Toms v. Taft*, 338 F.3d 519, 528–29 (6th Cir. 2003) (private settlement did not qualify plaintiffs as prevailing parties); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 164–66 (3d Cir. 2002) (settlement incorporated in court order giving plaintiff right to seek judicial enforcement of settlement rendered plaintiff a prevailing party).

1651. *Roberson*, 346 F.3d at 78, 83. See also *Lake Forest*, 624 F.3d at 1089–90.

1652. *Kay v. Ehrler*, 499 U.S. 432, 437–38 (1991).

1653. *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1673 (2010) ("strong" presumption that lodestar method yields reasonable fee); *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (lodestar normally provides reasonable fee); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the amount of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."). See also *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 522 F.3d 182, 188, 190 (2d Cir. 2008) (acknowledging Supreme Court has adopted lodestar method "in principle," but adopting modified approach using reasonable hourly rate to determine "presumptively reasonable fee"). But see *McDow v. Rosad*, 657 F. Supp. 2d 463, 467 (S.D.N.Y. 2009) (how *Arbor Hill* "process substantially differs from the lodestar approach" is not obvious).

1654. *Perdue*, 130 S. Ct. at 1673. *Perdue* rejected the so-called twelve *Johnson* factors (*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 717, 717–19 (5th Cir. 1974)) to compute a reasonable fee award because they gives district courts "unlimited discretion" and "little guidance" in determining a reasonable fee. *Id.* at 1672 (quoting *Pennsylvania v. Del. Valley Citizens Council for Clear Air*, 478 U.S. 546, 563 (1986)). By contrast,

the lodestar method produces an award that *roughly* approximates the fees that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case . . . is readily administrable, . . . is 'objective,' . . . and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

*Id.*

1655. *Id.* at 1674.

1656. *Hensley*, 461 U.S. at 430. See also *Perdue*, 130 S. Ct. at 1672 ("[A] 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.") (citations omitted). *Id.* at 1674.

1657. *Fox v. Vice*, 131 S. Ct. 2205, 2217 (2011).

1658. *Id.* at 2216.

1659. *Farbotko v. Clinton Cnty.*, 433 F.3d 204, 209 (2d Cir. 2005) (quoting *Blum*, 465 U.S. at 896 n.11). *Accord Smith v. Phila. Hous. Auth.*, 107 F.3d 223, 225 (3d Cir. 1997); *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

1660. *Blackman v. District of Columbia*, 397 F. Supp. 2d 12, 14 (D.D.C. 2005).

1661. *Ass'n for Retarded Citizens of Conn. Inc. v. Thorne*, 68 F.3d 547, 554 (2d Cir. 1995) (citing *Miele v. N.Y. Teamsters Conf. Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir. 1987)). *Accord* *Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006).

1662. *Amato v. City of Saratoga Springs*, 991 F. Supp. 62, 66 (N.D.N.Y. 1998). *Accord* *Anderson v. Rochester-Genesee Reg'l Transp. Auth.*, 388 F. Supp. 2d 159, 167 (W.D.N.Y. 2005).

In *Farbotko v. Clinton County*, 433 F.3d 204 (2d Cir. 2005), the Second Circuit held that the district court erred in basing the hourly rates solely on the rates used in other cases in the federal district. A reasonable hourly rate must reflect the “prevailing market rate.” *Farbotko*, 433 F.3d at 208. “Recycling rates awarded in prior cases without considering whether they continue to prevail may create disparity between compensation available under § 1988(b) and compensation available in the marketplace. This undermines § 1988(b)’s central purpose of attracting competent counsel to public interest litigation.” *Id.* at 209. There must be a “case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant’s counsel. This may . . . include judicial notice of rates awarded in prior cases and the court’s own familiarity with the rates prevailing in the district,” as well as any “evidence proffered by the parties.” *Id.* A reasonable rate “is not ordinarily ascertained simply by reference to rates awarded in prior cases.” *Id.* at 208. The same rate should be used for both the trial and appellate courts. Rather than establish the appropriate rates itself, the Second Circuit found it preferable to remand the issue to the district court, which is “in closer proximity to and has greater experience with the relevant community whose prevailing market rate it is determining.” *Id.* at 210 (citations omitted).

1663. *See, e.g., Simmons v. N.Y. City Transit Auth.*, 575 F.3d 170, 175–77 (2d Cir. 2009). *See also* authorities cited in 2 Schwartz & Kirklin, *supra* note 1641, § 5.03.

1664. *Simmons*, 575 F.3d at 175.

1665. *Id.* at 176.

1666. *Missouri v. Jenkins*, 491 U.S. 274, 280–84 (1989). *Accord* *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 577–88 (2008) (Equal Access to Justice Act).

1667. *In re Donovan*, 877 F.2d 982, 994 (D.C. Cir. 1989) (fee application must “include contemporaneous time records of hours worked and rates claimed, plus a detailed description of the subject matter of the work with supporting documents, if any”); *Grendel’s Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984) (“the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance”).

1668. *Bell v. United Princeton Props., Inc.*, 884 F.2d 713, 721 (3d Cir. 1989).

1669. *Id.* (quoting *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983)).

1670. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298–99 (1st Cir. 2001).

1671. *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011).

1672. *See, e.g., Binta B. v. Gordon*, 710 F.3d 608 (6th Cir. 2013); *Balla v. Idaho*, 677 F.3d 910 (9th Cir. 2012); *Johnson v. City of Tulsa*, 489 F.3d 1089 (10th Cir. 2007). *But see* *Alliance to End Repression v. City of Chi.*, 356 F.3d 767 (7th Cir. 2004).

1673. *See, e.g., Anderson v. Rochester-Genesee Reg'l Transp. Auth.*, 388 F. Supp. 2d 159, 167–69, 171 (W.D.N.Y. 2005) (court reduced rates of plaintiffs’ counsel by 20% because

plaintiffs' counsel failed to exercise proper billing judgment and exclude excessive, redundant, or unnecessary hours).

1674. *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1673–74 (2010); *Blum v. Stenson*, 465 U.S. 886, 897–98 (1984). *See also* *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006) (“only in rare circumstances should a court adjust the lodestar figure, as this figure is the presumptively accurate measure of reasonable fees”). “[A] fee applicant seeking an enhancement must produce ‘specific evidence’ that supports the award.” *Perdue*, 130 S. Ct. at 1673.

1675. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986). *See also* *Blum*, 465 U.S. at 899 (“The ‘quality of representation’ . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was ‘exceptional.’”).

1676. *Perdue*, 130 S. Ct. at 1662; *Hensley*, 461 U.S. at 435. In *Perdue*, the Supreme Court collapsed “results obtained” and “superior attorney performance” into one factor, i.e., superior performance. *Perdue*, 130 S. Ct. at 1674. The Court, however, has “never sustained an enhancement of a lodestar amount for performance. . . .” *Id.* at 1673.

1677. *Missouri v. Jenkins*, 491 U.S. 274, 282–84 (1989). *Accord* *Perdue*, 130 S. Ct. at 1675. The rationale for allowing an upward adjustment for delay of payment, or the use of current rates, is that “compensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed.” *Id.* at 283.

1678. *City of Burlington v. Dague*, 505 U.S. 557, 560–61 (1992). *Accord* *Perdue*, 130 S. Ct. at 1676.

1679. *Perdue*, 130 S. Ct. at 1673.

1680. 477 U.S. 561 (1986).

1681. *Id.* at 564–65.

1682. *Id.* at 575.

1683. *Blanchard v. Bergeron*, 489 U.S. 87, 92–94 (1989).

1684. *Venegas v. Mitchell*, 495 U.S. 82, 86–88 (1990).

1685. *Webb v. Cnty. Bd. of Educ.*, 471 U.S. 234, 250 (1985).

1686. *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 86–92 (1991). An amendment to § 1988 authorized an award of expert witness fees only in actions under 42 U.S.C. § 1981 or § 1981(a). 42 U.S.C. § 1988(c) (2006).

1687. *Blum v. Stenson*, 465 U.S. 886, 894–95 (1984). *Accord* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982).

1688. 209 U.S. 123 (1908). *See supra* Chapter 13.

1689. *Hutto v. Finney*, 437 U.S. 678, 690–92 (1978).

1690. *Missouri v. Jenkins*, 491 U.S. 274, 279–84 (1989).

1691. 473 U.S. 1 (1985).

1692. *Id.* at 8–11. *See also* *Bogan v. City of Boston*, 489 F.3d 417, 431 (1st Cir. 2007) (Rule 68 requires comparison between amount of offer at judgment, including “costs then accrued,” and damages recovered plus pre-offer fees actually awarded, not pre-offer fees requested by plaintiffs).

1693. *Marek*, 473 U.S. at 6 (citation omitted). *See also* *Barbour v. City of White Plains*, 700 F.3d 631, 633–34 (2d Cir. 2012); *Lima v. Newark Police Dep’t*, 658 F.3d 324, 330–31 (3d Cir. 2011).

1694. *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1026–28 (9th Cir. 2003) (non-§ 1983); *Payne v. Milwaukee Cnty.*, 288 F.3d 1021, 1026–27 (7th Cir. 2002); *Harbor Motor Co. v. Arnell Chevrolet-Geo*, 265 F.3d 638, 645 (7th Cir. 2001) (non-§ 1983); *O’Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). *Contra* *Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997).

1695. 475 U.S. 717 (1986).

1696. *Id.* at 730–32 & n.19. *Accord* *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990). *See also* *Astrue v. Ratliff*, 130 S. Ct. 2321 (2010) (EAJA).

1697. *Evans*, 475 U.S. at 731–32.

1698. *Perdue*, 130 S. Ct. at 1676; *Bogan*, 489 F.3d at 431; *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1065 (9th Cir. 2006) (following *Chalmers v. Los Angeles*, 795 F.2d 1205 (9th Cir. 1986)); *Browder v. City of Moab*, 427 F.3d 717, 721 (10th Cir. 2005).



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Wimberly v. City of Clovis, 375 F. Supp. 2d 1120 (D.N.M. 2004), n. 852

**State Court**

Shaw v. Leatherberry, 706 N.W. 2d 299 (Wis. 2005), n. 82



## Appendix: Model Instructions

### **Model Instruction 1: Section 1983—Elements of Claim—Action Under Color of State Law**

[Plaintiff] must prove both of the following elements by a preponderance of the evidence:

First: [Defendant] acted under color of state law.

Second: While acting under color of state law, [defendant] deprived [plaintiff] of a federal [constitutional right] [statutory right].

I will give you more details on action under color of state law, after which I will tell you the elements [plaintiff] must prove to establish the violation of [his/her] federal [constitutional right] [statutory right].

The first element of [plaintiff's] claim is that [defendant] acted under color of state law. This means that [plaintiff] must show that [defendant] was using power that [he/she] possessed by virtue of state law.

A person can act under color of state law even if the act violates state law. The question is whether the person was clothed with the authority of the state, by which I mean using or misusing the authority of the state.

By “state law,” I mean any statute, ordinance, regulation, custom or usage of any state. And when I use the term “state,” I am including any political subdivisions of the state, such as a county or municipality, and also any state, county or municipal agencies.

Source: Third Circuit Model Jury Instructions Civil 4.3 and 4.4 (2011)

### **Model Instruction 2: Fourth Amendment Excessive Force Claim**

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force [in making a lawful arrest] [and] [or] [in defending [himself] [herself] [others]]. Thus, in order to prove an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officer[s] used excessive force when [insert factual basis of claim].

Under the Fourth Amendment, a police officer may only use such force as is “objectively reasonable” under all the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.

In determining whether the officer[s] used excessive force in this case, consider all of the circumstances known to the officer[s] on the scene, including:

1. The severity of the crime or other circumstances to which the officer[s] [was] [were] responding;
2. Whether the plaintiff posed an immediate threat to the safety of the officer[s] or to others;
3. Whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;
4. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary;
5. The type and amount of force used;
6. The availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff];
7. Other factors particular to the case.

Source: Ninth Circuit Manual of Model Jury Instructions Civil 9.22 (2003)

### **Model Instruction 3: Eighth Amendment Prisoner Excessive Force Claim**

To succeed on his claim of excessive use of force, Plaintiff must prove each of the following things by a preponderance of evidence:

1. Defendant used force on Plaintiff;
2. Defendant intentionally used extreme or excessive cruelty toward Plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline;
3. Defendant's conduct caused harm to Plaintiff;
4. [Defendant acted under color or law].

In deciding whether Plaintiff has proved that Defendant intentionally used extreme or excessive cruelty toward Plaintiff, you may consider such factors as:

- the need to use force;
- the relationship between the need to use force and the amount of force used;
- the extent of Plaintiff's injury;
- whether Defendant reasonably believed there was a threat to the safety of staff or prisoners;
- any efforts made by Defendant to limit the amount of force used.

[In using force against a prisoner, officers cannot realistically be expected to consider every contingency or minimize every possible risk.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Source: Seventh Circuit Federal Jury Instructions Civil 7.15 (2010)

#### **Model Instruction 4: Fourth Amendment False Arrest Claim**

In this case, Plaintiff claims that Defendant falsely arrested him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant arrested Plaintiff;
2. Defendant did not have probable cause to arrest Plaintiff; and
3. Defendant was acting under color of law.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Let me explain what “probable cause” means. There is probable cause for an arrest if at the moment the arrest was made, a prudent person would have believed that Plaintiff [had committed/was committing] a crime. In making this decision, you should consider what Defendant knew and what reasonably trustworthy information Defendant had received.

[It is not necessary that Defendant had probable cause to arrest Plaintiff for [offense in case], so long as Defendant had probable cause to arrest him for some criminal offense.] [It is not necessary that Defendant had probable cause to arrest Plaintiff for all of the crimes he was charged with, so long as Defendant had probable cause to arrest him for one of those crimes.]

Probable cause requires more than just a suspicion. But it does not need to be based on evidence that would be sufficient to support a conviction, or even a showing that Defendant’s belief was probably right. [The fact that

Plaintiff was later acquitted of [offense in case] does not by itself mean that there was no probable cause at the time of his arrest.]

Source: Seventh Circuit Federal Jury Instructions Civil, 7.05 and 7.06 (2010)

### **Model Instruction 5: Municipal Liability—General Instruction**

If you find that [plaintiff] was deprived of [describe federal right], [municipality] is liable for that deprivation if [plaintiff] proves by a preponderance of the evidence that the deprivation resulted from [municipality's] official policy or custom—in other words, that [municipality's] official policy or custom caused the deprivation.

[It is not enough for [plaintiff] to show that [municipality] employed a person who violated [plaintiff's] rights. [Plaintiff] must show that the violation resulted from [municipality's] official policy or custom.] “Official policy or custom” includes any of the following [include any of the following theories that are warranted by the evidence]:

- a rule or regulation promulgated, adopted, or ratified by [municipality's] legislative body;
- a policy statement or decision that is officially made by [municipality's] [policy-making official];
- a custom that is a widespread, well-settled practice that constitutes a standard operating procedure of [municipality]; or
- [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. However, [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. However, [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] failure to adopt a needed policy] does not count as “official policy or custom” unless the [municipality] is deliberately indifferent to the fact that a violation of [describe the federal right] is highly predictable consequence of the [inadequate training] [inadequate supervision] [inadequate screening during the hiring process] [failure to adopt a needed policy]. I will explain this further in a moment.

I will now proceed to give you more details on [each of] the ways[s] in which plaintiff] may try to establish that an official policy or custom of [municipality] caused the deprivation.

Source: Third Circuit Model Jury Instructions Civil 4.6.9 (2011)

**Model Instruction 6: Municipal Liability—Inadequate Training or Supervision**

[Plaintiff] claims that [municipality] adopted a policy of [inadequate training] [inadequate supervision], and that this policy caused the violation of [plaintiff's] [specify right].

In order to hold [municipality] liable for the violation of [plaintiff's] [specify right], you must find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [[Municipality's] training program was inadequate to train its employees to carry out their [duties] [municipality] failed adequately to supervise its employees].

Second: [Municipality's] failure to [adequately train] [adequately supervise] amounted to deliberate indifference to the fact that inaction would obviously result in the violation of [specify right].

Third: [Municipality's] failure to [adequately train] [adequately supervise] proximately caused the violation of [specify right].

In order to find that [municipality's] failure to [adequately train] [adequately supervise] amounted to deliberate indifference, you must find that [plaintiff] has proved each of the following three things by a preponderance of the evidence:

First: [Governing body] or [policy-making official] knew that employees would confront a particular situation.

Second: The situation involved [a matter that employees had a history of mishandling].

Third: The wrong choice by an employee in that situation will frequently cause a deprivation of [specify right].

In order to find that [municipality's] failure to [adequately train] [adequately supervise] proximately caused the violation of [plaintiff's] federal right, you must find that [plaintiff] has proved by a preponderance of the evidence that [municipality's] deliberate indifference led directly to the deprivation of [plaintiff's] [specify right].

Source: Third Circuit Model Jury Instructions Civil 4.6.7 (2011)

### **Model Instruction 7: Compensatory Damages**

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained [and is reasonably certain to sustain in the future] as a direct result of [insert appropriate language, such as “the failure to provide plaintiff with medical care,” etc.] [These are called “compensatory damages”.]

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

[1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]]

[2. The [wages, salary, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability/diminished ability] to work.]

[When I say “present value,” I mean the sum of money needed now to which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those monetary losses at the times in the future when they will be sustained.]

[3. The physical [and mental/emotional] pain and suffering [and disability/loss or a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.]

[If you find in favor of Plaintiff but find that the plaintiff has failed to prove compensatory damages, you must return a verdict for Plaintiff in the amount of one dollar (\$1.00).]

Source: Seventh Circuit Federal Jury Instructions Civil 7.23 (footnote omitted) (2010)



### **Model Instruction 8: Punitive Damages**

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that his conduct was malicious or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendant's conduct;
- the impact of Defendant's conduct on Plaintiff;
- the relationship between Plaintiff and Defendant;
- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- Defendant's financial condition;]
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

Source: Seventh Circuit Federal Jury Instructions Civil 7.24 (2010)

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